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United States Court of Appeals
For The District of Columbia Circuit

Argued Feb. 9, 2010. Decided April 16, 2010

No. 09-7023

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
APPELLANTS

V.

BNSF RAILWAY COMPANY, ET AL.,
APPELLEES.

[*444]Appeal from the United States District Court
for the District of Columbia
(No. 1:07-mc-00489-PLF-JMF)

Christopher Lovell argued the cause for appellants. With him on the briefs were *Gary E. Mason*, *Jared B. Stamell*, and *Richard J. Schager, Jr.*

Alan M. Wiseman argued the cause for appellees. With him on the brief were *Thomas A. Isaacson*, *Peter A. Barile III*, *Tyrone R. Childress*, *David G. Meyer*, *John M. Nannes*, *Tara L. Reinhart*, *Saul P. Morgenstern*, *Richard J. Favretto*, *Robert M. Jenkins III*, *Gary A. Winters*, *Richard McMillan Jr.*, *Kent Alan Gardiner*, and *Kathryn D. Kirmayer*. *Linda S. Stein* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

[*445]WILLIAMS, *Senior Circuit Judge*: Plaintiff-appellants are firms that have indirectly purchased rail freight service from one or more of the defendant railroads. The traffic moves under railroad-shipper contracts that, pursuant to 49 U.S.C. § 10709, are generally not subject to challenge before the Surface Transportation Board ("STB" or "Board").[1] Plaintiffs

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[1] 49 U.S.C. § 10709(c)(1) (2006) ("A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part."). Shippers not wishing to enter into contracts can ship pursuant to common carrier rates that railroads must provide on request pursuant to 49 U.S.C. § 11101(b) (2006). The Board has authority to regulate the rates of common carrier traffic if the railroad has "market dominance" with respect to such traffic, *id.* §§ 10701(d), 10702(1), 10707, and to regulate the reasonableness of the railroad's "rules and practices" regardless of market dominance, *id.* § 10702(2). The Board can also "exempt" "a person, class of persons, or a transaction or service" when it finds that application of the regulatory regime "(1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]; and (2) either–(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." *Id.* § 10502(a). Plaintiffs originally sought to challenge both § 10709 contract freight and § 10502(a) exempt freight, but they abandoned their claims involving § 10502(a) exempt freight in briefing before the district court and on appeal.

allege that since 2003 the railroads conspired to impose fuel surcharges on the freight in a way that raised the shipping rates above competitive levels. Plaintiffs seek a judicial remedy for contract traffic that would match–and extend–the remedy that the Board gave common carrier traffic in *Rail Fuel Surcharges*, Ex Parte No. 661, 2007 WL 201205 (S.T.B. Jan. 25, 2007), but which it explicitly withheld from contract traffic, see *id.* at *10.

Plaintiffs' antitrust allegations are part of at least eighteen separate class actions, consolidated before the district court, involving various putative classes of direct and indirect purchasers of rail freight services. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 593 F. Supp. 2d 29, 32 (D.D.C. 2008). (The direct purchasers raise only federal antitrust claims, which are still pending before the district court. *Id.* at 35-36.) The indirect purchasers sought injunctive relief for their antitrust claims under federal law; in addition, in order to secure damages precluded under federal law, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), they asserted various state law claims under theories of antitrust, consumer protection, unfair competition, and unjust enrichment and disgorgement of profits.

The district court dismissed the indirect purchasers' state law claims as preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 701-727, 10101-16106 ("ICCTA").[2]

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[2] There are also two sections not codified at the citation above, namely, 11 U.S.C. § 1162 and 45 U.S.C. § 7971.

In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d at 40. In the district court's view, "permit[ting] plaintiffs to pursue their state [law claims] . . . would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been–creating just the patchwork of railroad regulation that ICCTA sought to preempt." *Id.* at 38. The district court allowed the indirect purchaser plaintiffs to pursue their federal antitrust claim for injunctive relief, *id.* at 43, a claim still pending along with that of the direct purchasers. At the request of the parties, the court entered a final judgment for **[*446]** defendants on the state law claims under Fed. R. Civ. P. 54(b), thereby enabling an immediate appeal that would otherwise have been impermissibly interlocutory. This appeal duly followed.

The statute's express pre-emption clause obviously is the best available reflection of Congress's intent on the subject. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002). The section reads as follows:

> The jurisdiction of the Board over –
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (2006). In this opinion, we will refer to the first sentence (ending with "is exclusive") as the exclusive jurisdiction clause, and to the second sentence (beginning with "Except as otherwise provided") as the exclusive remedies clause.

* * *

In an argument that would, if it were sound, likely apply to all elements of their statutory analysis, plaintiffs invoke the following sentence uttered by the Board: "When Congress removed rail transportation contracts from the Board's regulatory purview, it expressly stated that not only state contract laws but also federal and state antitrust laws would apply fully to those agreements." *Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, No. 42095, 2007 WL 934378, at *3 (S.T.B. Mar. 26, 2007). Plaintiffs argue in a footnote that we should defer to this statement under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Lest there be any confusion on the point, we note at the outset that Congress did *not* "expressly state"

what the Board said it had. The Board in fact cited only the House committee report, which on the page referred to by the Board merely stated, "If anti-competitive behavior is alleged, under this section, the antitrust laws are the appropriate and only remedy available." Comm. on Interstate & Foreign Commerce, Staggers Rail Act of 1980, H.R. Rep. No. 96-1035, at 58 (1980), *as reprinted* in 1980 U.S.C.C.A.N. 3978, 4003.

In any event plaintiffs' conclusory assertion that we owe the statement *Chevron* deference encounters insuperable hurdles. First, we've several times noted that whether an agency decision against preemption of a state or local law receives *Chevron* deference is an open question in this circuit. See *Riffin v. Surface Transportation Bd.*, 592 F.3d 195, 197 (D.C. Cir. 2010); *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1074-75 (2008). Yet plaintiffs offer no argument on the question; we commonly treat such an omission as a waiver. See, e.g., *United States v. Hughes*, 514 F.3d 15, 18 (D.C. Cir. 2008). The Supreme Court's recent treatment of the issue in *Wyeth v. Levine*, __ U.S. __, 129 S.Ct. 1187 (2009), declaring that "agencies have no special authority to pronounce on preemption absent delegation by Congress," *id.* at 1201, which several circuits have invoked in declining deference, see, e.g., [*447]*Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 414 (5th Cir. 2010); *Barrientos v. Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009), obviously puts the *Chevron* deference claim in further doubt.

But assuming in plaintiffs' favor that agencies are due *Chevron* deference for their rulings on preemption of state law, the Board's inaccurate remark in *Kansas City Power & Light* would not be due such deference. The Board was engaged in resolving whether it had jurisdiction over a shipper's complaint: it would if the rates in question were common carrier tariff rates subject to 49 U.S.C. § 10701(d)(1) (2006); *id.* § 10702, but would not if they were "contract rates" under § 10709. Because the rates fell into the common carrier classification under Board precedent, and the parties had reasonably relied thereon, it found jurisdiction but started a rulemaking to clarify the boundary between the two. It made the quoted observation about state antitrust claims only to illustrate the undisputed proposition that the classification had consequences. Such a dictum is plainly not entitled to *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). What we have just said also disposes of any possible claim that we owe the remark deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Thus we address the parties' arguments de novo.

* * *

Plaintiffs object to the district court's preemption decision on two principal grounds. First, they say that § 10501(b)'s preemption provisions do not apply at all to freight transported pursuant to private contracts that are not generally subject to challenge before the Board. Second, they say that even if those

provisions apply to such transportation, the state law remedies they seek are not remedies "with respect to regulation of rail transportation" and are therefore not the sort of remedies that § 10501(b) preempts.

Plaintiffs' argument that the preemption language of § 10501(b) does not apply to freight transported under private rail contracts has two related aspects: First, in plaintiffs' view, only the exclusive remedies clause is relevant to ICCTA preemption analysis; they criticize the district court for relying on cases discussing the exclusive jurisdiction clause to support its preemption holding, noting that the clause does not use the word "preemption." Second, the exclusive remedies clause has an express provision for exceptions "as otherwise provided in this part," and plaintiffs argue that their state law claims fall within that exception. We will start with § 10709(c)'s provision of an exception:

> (1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the

> district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

49 U.S.C. § 10709(c) (2006).

Plaintiffs read § 10709(c)(1) as taking private contracts completely outside the federal regulatory regime *and* as permitting plenary state regulation of freight moving under such contracts. This is a **[*448]** plainly erroneous reading. The provision merely limits the *Board's* authority over the terms of private contracts.[3] The limitation was imposed as part of surface freight deregulation legislation adopted over the past several decades. It was not intended to restore any regulatory authority to the states.

Both the exclusive jurisdiction clause of the provision now found in § 10501(b), and the rule removing private contracts from federal regulation, were originally added to the U.S. Code as part of the Staggers Rail Act of 1980. See Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1909 (originally codified at 49 U.S.C. § 10713(i) (1994), now codified as amended at 49 U.S.C. § 10709(c) (2006)) (private contracts); *id.* § 214(c)(5), 94 Stat. at 1915 (originally codified at 49 U.S.C. § 10501(d) (1994), now codified as amended at 49 U.S.C. § 10501(b) (2006)) (preemption). Contrary to plaintiffs' assertions that federal preemption of

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[3] A quite separate way in which Board authority may be curtailed is through the Board's exercise of its authority under 49 U.S.C. § 10502(a) to "exempt a person, class of persons, or a transaction or service" on the making of certain findings.

state remedies was first introduced in 1995, see Appellants' Br. at 29 (asserting that "[u]nder the Interstate Commerce Act remedies were not exclusive, but rather cumulative"), in fact the Staggers Act's exclusive jurisdiction clause gave preemption of state remedies an explicit statutory basis. *G. & T. Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987) (so holding, but noting that longstanding judicial interpretations of pre-Staggers Act legislation also had much preemptive effect).

Indeed, courts found many state laws respecting rail transportation to be preempted following the Staggers Act even though it contained only the exclusive jurisdiction clause and not a separate exclusive remedies clause such as exists today. Thus *G. & T. Terminal Packaging Co.* held, "Since [§ 10501(d) (1982)], as illuminated by legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes, the savings clause, 49 U.S.C. § 10103 (1982) [which preserved common law "[e]xcept as otherwise provided in this subtitle"], has no application to this case." *Id.*; *Gendron v. Chi. & N.W. Transp. Co.*, 564 N.E. 2d 1207, 1218 (Ill. 1990) (finding a state law challenge to a transfer of a rail line approved by the ICC as preempted where "granting plaintiffs the legal and equitable relief they seek would [have] impermissibly interfere[d] with the ICC's broad authority over rail line transactions" and citing *inter alia* former 49 U.S.C. § 10501(d) for the proposition that "[t]he ICC's jurisdiction to approve or to condition approval

of rail line transactions like the one challenged here is exclusive and plenary"); see also H.R. Rep. No. 104-422, at 167 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 850, 852 ("[S]ince 1980, former section 10501(d) [predecessor of the current exclusive jurisdiction clause] and 11501(b) [a provision dropped in 1995, providing for limited state regulation under strict ICC supervision], with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."); cf. *People v. Conrail Corp.*, 613 N.E. 2d 784, 793-94 (Ill. App. Ct. 1993) (arguing that former § 10501(d) "merely provides that *to the extent of the jurisdiction conferred by the Commerce Act*, the ICC and State authorities have exclusive jurisdiction with respect to transportation by rail carriers"; but the context was a claim that the Staggers Act preempted state environmental regulation, **[*449]** an issue which, as we explain below, is quite distinct from regulation of railroad-shipper relations).

This pulls both legs out from under plaintiffs' argument that § 10501(b)'s exclusivity provisions do not apply to the contract traffic in question. The exclusive jurisdiction clause and the cases construing it *are* relevant to the present issue, and § 10709's exception, whatever its ultimate effect, *leaves* § 10501(b) applicable to contract traffic.

The current provision largely removing private contracts from federal regulation (§ 10709(c)) also had its genesis in the Staggers Act. Railroads were

authorized to enter into such contracts, and required to file them with the ICC, consistent with tariff rules to be developed by the Commission so as to make their essential terms available to the public. The Staggers Act directed the Commission to approve such contracts except in very limited circumstances. See Pub. L. No. 96-448, § 208, 94 Stat. at 1908-10 (originally codified as amended at 49 U.S.C. § 10713 (1994), now codified as amended at 49 U.S.C. § 10709 (2006)). Once so approved, a contract could not be challenged for violation of "this subtitle [subtitle IV, governing economic regulation of railroads]." *Id.* at 1909 (originally codified at 49 U.S.C. § 10713(i)(1) (1994), now codified as amended at 49 U.S.C. § 10709(c)(1) (2006)). Congress intended in 1980 to "clarif[y] the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements." H.R. Rep. No. 96-1430, at 98-99 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. at 4130-31. In its *Rail Fuel Surcharges* decision, the Board said that § 10709 left the ICC with "no authority to regulate rail rates and services that are governed by a contract." 2007 WL 201205, at *10.

Summarizing the Staggers Act's impact on the overall role of state law, the conference report said: "The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other *federal* statutes which are not inconsistent with the Inter-

state Commerce Act. No state law or federal or state common law remedies are available." H.R. Rep. No. 96-1430, at 106 (emphasis added), *as reprinted* in 1980 U.S.C.C.A.N. at 4138. Discussing the new private contracts provision, the report noted, "The existing Federal antitrust laws apply to this section," see *id.* at 101, *as reprinted in* 1980 U.S.C.C.A.N. at 4133, suggesting by negative inference that state antitrust laws generally did not apply. By that stage, then, Congress had clearly preempted *state* regulation of rail transportation, *both* for ICC-regulated freight and freight moving under private contracts.

We then must consider whether any of the changes wrought by the ICCTA itself reduced the scope of Staggers Act preemption. They did not. The ICCTA did add the exclusive remedies clause to § 10501, along with the caveat that it would apply "[e]xcept as otherwise provided in this part." But, as we said earlier, this provision was merely a reorganization of pre-1995 law, under which federal remedies with respect to rail transportation were already exclusive, subject to parties' rights to contract enforcement. H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 ("[S]ince 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."). Plaintiffs' view would require us to infer that the addition of the general

"[e]xcept[*450] as otherwise provided in this part" clause somehow converted § 10709(c)(1)'s *pre-existing* provision for private contracts into a new source of state regulatory authority. See 49 U.S.C. § 10709(c)(1) (2006) (originally codified prior to amendment at 49 U.S.C. § 10713(i)(1) (1994)). They offer no reason supporting such a transformation.

The ICCTA, to be sure, altered the context slightly, but entirely in a deregulatory direction, making it most improbable that Congress intended to invite state regulatory authority into the picture. First, Congress further narrowed the authority of the regulatory agency (now the STB) to regulate private contracts, principally by eliminating certain procedures that allowed rather limited challenges before the old ICC. See H.R. Rep. No. 104-422, at 174, *as reprinted in* 1995 U.S.C.C.A.N. at 859 (describing the eliminated procedures as "very limited and seldom utilized"). But there was no change in § 10709(c)'s provision that contract rail transport "shall not be subject" to the provisions of the Act, meaning that the 1995 Act did not effect any substantive change on that score. See Pub. L. No. 104-88, § 102(a), 109 Stat. at 817 (codified at 49 U.S.C. § 10709(c)(1) (2006)).

Further, in one respect Congress explicitly expanded the scope of preemption: it deleted from the exclusive jurisdiction clause any reference to ICC-certified state authorities and the associated certification procedures. See Pub. L. No. 96-448, § 214(c)(5), 94 Stat. at 1915 (originally codified at 49 U.S.C. § 10501(d) (1994), now codified as amended at

49 U.S.C. § 10501(b) (2006)) ("The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive."). This of course was a *de*regulatory move–not, as plaintiffs would have us believe, an invitation to states to fill the regulatory void created by federal deregulation. See, e.g., S. Rep. No. 104-176, at 6 (1995) ("The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation. However, nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill.").

In short, the ICCTA left the exclusive jurisdiction clause in full force, supplementing it with the exclusive remedies clause and its explicit exception, expressly alluding to the preexisting § 10709(c)'s provision for contract actions.

* * *

Plaintiffs' fallback argument is that their state law claims do not involve "regulation of rail transportation" and therefore are not preempted by § 10501(b). The district court discussed the state law claims of each type as a general class without discussing any state-to-state differences among the laws, see *In re Rail Freight Fuel Surcharge Antitrust*

Litig., 593 F. Supp. 2d at 37-39, and on appeal both parties have generally followed the same approach. We therefore treat the plaintiffs as having waived any argument that unique aspects of certain states' law governing consumer protection, unjust enrichment, or antitrust might compel a different result for a class of plaintiffs whose claims would be governed by such laws. We will proceed, as the parties have, on the assumption that any differences in individual states' laws are immaterial to the preemption analysis.

[*451] Plaintiffs correctly point out that the ICCTA does not preempt all state and local regulations. The circuits appear generally, for example, to find preemption of environmental regulations, or similar exercises of police powers relating to public health or safety, only when the state regulations are either discriminatory or unduly burdensome. See, e.g., *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643-44 (2d Cir. 2005) (including risk of permitting delay in assessment of burden); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-55 (3d Cir. 2007); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (finding common law nuisance preempted); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001); cf. *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998) (seeming to apply a broader preemption rule). Several of the cases, in addressing these environmental regulations, note

that the ICCTA "does not preempt only explicit economic regulation." *N.Y. Susquehanna & W. Ry. Corp.*, 500 F.3d at 252; see also *City of Auburn*, 154 F.3d at 1030 (similar). By implication, such cases recognize that the core of ICCTA preemption is "economic regulation," which we take to refer to regulation of the relationship before us here, that of shippers and carriers.

Railroad-shipper transactions indeed pose a problem quite different from environmental regulation. As we have seen, § 10709(c)(1) explicitly makes actions in state or federal court the "exclusive remedy for any alleged breach of a contract entered into under this section." This provision for conventional contract enforcement obviously is an "[e]xcept[ion] . . . otherwise provided in this part" contemplated by the exclusive remedies clause. And courts readily provide such remedies. See *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009) (affirming contract enforcement); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545-46 (5th Cir. 2005) (recognizing propriety of state law contract claim but denying relief on the merits).

By contrast, the circuits have found shippers' quests for non-contractual relief to be preempted as would-be invasions of the regulatory domain. Thus in *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186 (10th Cir. 2008), the court preserved a shipper's contract claim against a railroad for ceasing service on a spur but found its tort claim to be completely preempted by ICCTA. *Id.* at 1188-91. And in *G. & T. Terminal Packaging Co.*, the court found that, for

shipments exempted from regulation, the Staggers Act had completely preempted state common law remedies for railroad price discrimination among shippers. 830 F.2d at 1233-36.

The legislative history supports the courts' refusal to let non-contract state law intrude into the statutorily preserved shipper-carrier remedies. As the House Report on ICCTA said, "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive." H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis in original), *as reprinted in* 1995 U.S.C.C.A.N. 793, 808; see also H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 (noting that some criminal statutes are not preempted by the ICCTA "because they do not generally collide with the scheme of economic regulation (*and deregulation*) of rail transportation" (emphasis added)); H.R. Rep. No. 96-1430, at 105, *as reprinted in* 1980 U.S.C.C.A.N. at 4137 (noting that the Staggers Act "reaffirms that where the commission has withdrawn its jurisdiction [***452**] to regulate, the State could not assume such jurisdiction").[4] As the

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[4] This Report is addressed to the original Senate proposal, which explicitly stated the point made in the report with language omitted from the ultimate version, but that in other respects did not go *as far as* the ultimate version in curtailing state regulatory authority. Compare S. Rep. No. 96-470, at 77-78 (1979) (Senate proposing that the statute contain a subsection making clear that "[f]ederal withdrawal from certain areas of regulation shall not be construed as relinquishing

legislative comments quoted above make clear, Congress sought to avert the sort of frustration of its deregulatory purpose potentially inflicted by state rights and remedies outside the specifically preserved realm of contract breach.

Congress also recognized that enforcement of state law outside the contract realm could easily lead to balkanization, with shipments subject to fluctuating rules as they crossed state lines. As the House Report on ICCTA said: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 96, *as reprinted in* 1995 U.S.C.C.A.N. at 808.[5] State

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Federal jurisdiction"), with H.R. Rep. No. 96-1430, at 106, *as reprinted in* 1980 U.S.C.C.A.N. at 4138 (discussing House proposals, all adopted in the final version, that "only State authorities whose standards and procedures have been certified by the Commission may exercise jurisdiction over intrastate rail," that "[d]ecisions of State authorities may be appealed to the Commission," and that "where the Interstate Commerce Act provides an exclusive remedy, such remedy is not in addition to remedies under another law or at common law").

[5] Although the House Report is addressing a bill that lacks the phrase "with respect to rail transportation," there is no reason to suppose that inclusion of that phrase in the final bill reflected a congressional embrace of balkanization.

antitrust claims obviously present a risk of balkanized legal norms, a risk not posed by federal antitrust law.

As pitched in this litigation, plaintiffs' state law claims would directly interfere with the ICCTA's deregulatory objectives. Plaintiffs left the basis for many of these claims unclear in their complaint, asserting only conclusorily that the defendants had violated various state laws. E.g., Indirect Purchasers' Consol. Am. Compl. 155 (alleging, without further elaboration, that "[d]efendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New York Gen. Bus. Law § 349 *et seq.*; and New York common law against restraints of trade"). But the legal theories plaintiffs have presented in briefing make clear that these claims are designed as a means of getting the district court to apply state law to assess the substantive "fairness" of the contracts the railroads entered into, including with reference to the manner in which the rates were computed. See *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 982 (11th Cir. 2008) (suggesting that if necessary a district court may use Rule 12(c) motions and the parties' memoranda to make sense of plaintiffs' allegations).

Thus, plaintiffs relied extensively before the district court on the argument that the Board, in *Rail Fuel Surcharges*, the proceeding that addressed fuel surcharges applied to common carrier freight, had found aspects of the rate computation "unfair" or "unreasonable." See Indirect Purchase Pls.' Mem. Opp'n Defs.' Joint Mot. Dismiss 40 ("[T]he STB has

already determined that the fuel surcharges at issue **[*453]** here are 'unreasonable,' 'misleading' and 'unfair' as contemplated by the consumer protection laws."); *id.* at 21 (describing this litigation as "seek[ing] recovery for conspiratorial and *unfair* overcharges" (emphasis added)); *id.* at 42 (characterizing the plaintiffs' claims as "challeng[ing] only the *unfair* and/or misleading nature of Defendants' fuel surcharges" (emphasis added)). And plaintiffs made no bones about their goal of extending the remedies that the STB ordered for *regulated* freight to freight over which Congress deliberately stripped the STB–*and states*–of any regulatory authority. See *id.* at 40 ("By raising consumer protection claims, Plaintiffs merely seek to enforce the STB's ruling . . . for claims arising in private contract."); *id.* at 29 ("[T]he court is asked only to enforce the STB's finding of unreasonableness such that Plaintiffs may obtain adequate redress.").

The law applicable to § 10709(c) contracts, of course, may involve state common law doctrines such as fraud and consideration, doctrines that will in some cases cause a contract to be negated or even modified. But whatever the circumstances in which unjust enrichment, consumer protection, or antitrust claims may be unpreempted, they do not include those before us, where those claims are advanced as a means of challenging the substantive *reasonableness* of the rates charged under private contracts.

We should say a few additional words about plaintiffs' state law antitrust claims, because

plaintiffs make one argument against preemption unique to such claims: They point out that a provision of the ICCTA, by creating a rule of evidence applicable to state law antitrust suits (as well as to federal ones), arguably contemplates preservation of state antitrust actions. The statute provides: "In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal [antitrust] law . . . *or of any similar State law*, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate . . . [approved in accordance with § 10706(a)(2)]." 49 U.S.C. § 10706(a)(3)(B)(ii) (2006) (emphasis added). Plaintiffs also point to legislative history that seemed to contemplate the applicability of at least some antitrust law. For example: "The Conference provision retains this general rule, while clarifying that [§ 10501(b)'s] exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally. For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. 850, 852.

Although the question is not before us, there is nothing in our reasoning inconsistent with the no-

tion that some *subset* of state or federal antitrust claims might permissibly be brought against railroads, for price-fixing or other violations. The relevant question is not whether all potential antitrust suits are preempted, but rather whether *this* antitrust suit, as formulated by the plaintiffs, impermissibly infringes the federal deregulatory interests in the ICCTA.

There has been a tension–and in federal antitrust law a radical change over time–between the goal of increasing consumer welfare in the economic efficiency sense and contrasting goals such as protecting small competitors or preventing the concentration of economic or political **[*454]** power without regard to economic efficiency. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 192 (1st Cir. 1996). It is far from clear that state antitrust law has, as a general matter, made the transition that has marked federal law. See, e.g., Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 73-74 (Free Press 1993) (1978) (describing the movement to "consumer welfare orientation" under federal antitrust law); *id.* at 74-77 (discussing early U.S. Supreme Court cases striking down state antitrust laws in which liability turned on the unreasonableness of prices); Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 Franchise L.J. 173, 173 (2008) (noting that even states generally following federal decisional law in

antitrust matters typically "leave themselves an escape route if federal law varies from state statute or putative state policy goals").

Illinois Brick, which plaintiffs' suit expressly seeks to avoid, represents the Supreme Court's judgment that allowing plaintiffs to use an indirect purchaser theory offensively, while prohibiting defendants from using the theory defensively, "would create a serious risk of multiple liability for defendants," and "the possibility of inconsistent adjudications." 431 U.S. at 730. *Illinois Brick* also rested on the proposition that full recovery for direct purchasers would generate more effective enforcement of the law. *Id.* at 734-35. Application of state laws rejecting *Illinois Brick* would jeopardize the federal interest in protecting railroad regulation from inefficient norms and balkanization.

We are presented in this case with an antitrust claim that was unambiguously concerned not just with strict "economic efficiency" but also with resurrecting in a different form state-level regulation of railroads, by inviting judicial supervision of the reasonableness and fairness of rates charged to shippers. Allowing state law antitrust claims of *this* nature would undermine the deregulatory and anti-balkanization policies underlying the ICCTA. We need not address imaginable state antitrust claims that might not run afoul of either of those congressional policies.

The judgment of the district court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

Filed On:
April 16, 2010

Appeal from the United States District Court
For the District of Columbia
(No. 1:07-mc-00489-PLF-JMF)

Before: ROGERS AND TATEL, *Circuit Judges*,
and WILLIAMS, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this

cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Date: April 16, 2010

Opinion for the court filed by
Senior Circuit Judge Williams.

MANDATE
Pursuant to the provisions of Fed. R. App. Prc. 41(a)
Issued: 6/25/10
By: /s/ Michael C. McGrail
Attached: __ Amending Order __ Opinion __ Order on Costs

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

1:07-mc-00489-PLF-JMF

Filed On: June 8, 2010

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT
FILED JUN -8 2010
CLERK

BEFORE: ROGERS AND TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*

ORDER

Upon consideration of appellants' petition for panel rehearing filed on May 17, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-7023 **September Term, 2009**

1:07-mc-00489-PLF-JMF

Filed On: June 8, 2010

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

APPELLANTS

v.

BNSF RAILWAY COMPANY, ET AL.,

APPELLEES

UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF
COLUMBIA CIRCUIT

FILED JUN -8 2010
CLERK

BEFORE: SENTELLE, *Chief Judge*, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, *Circuit Judges,* and WILLIAMS, *Senior Circuit*

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

[*Reported at 593 F.Supp.2d 29]
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT DIRECT PURCHASER PLAINTIFFS	

[*32]OPINION

This matter is before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.[1] The Court

[1] The papers submitted in connection with this motion include: Indirect Purchaser Plaintiffs' Consolidated Amended Class Action Complaint ("Compl "); Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Defendants' Joint Reply to Indirect Purchaser Plaintiffs' Opposition in Response to Defendants' Joint Motion to Dismiss; Indirect Purchaser Plaintiffs' Supplement to their Opposition to Defendants' Joint Motion to Dismiss; Defendants' Supplemental Memorandum of Points and Authorities in Support of Defendants' Joint Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint; and Indirect Purchaser Plaintiffs' Sup-

has carefully considered the arguments made by the parties in their papers and the oral arguments presented by counsel in open court on October 10, 2008. The Court has concluded that the indirect purchaser plaintiffs' state law claims are preempted by federal law and must be dismissed. The Court has also concluded that the indirect purchaser plaintiffs have stated a federal antitrust claim for injunctive relief and that this claim may proceed.

I. BACKGROUND

The Multidistrict Litigation Panel consolidated eighteen separate class actions, pending in six districts, involving common antitrust allegations against the four major United States railroads and transferred them to this Court on November 6, 2007. The plaintiffs were divided into two putative classes – those who allegedly purchased rail freight transportation services directly from defendants from July 1, 2003 until at least June 30, 2007 and who were assessed a rail fuel surcharge for the transportation services, and those who allegedly purchased rail freight transportation services indirectly from the defendants and were subject to a similar surcharge. Plaintiffs in both putative classes allege that the defendant railroads violated Section 1 of the Sherman Act by conspiring to fix prices through their use of fuel surcharges. The indirect purchaser plaintiffs also allege various claims arising from state anti-

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plemental Memorandum Regarding Federal Injunctive Relief Standing.

trust, consumer protection and unjust enrichment law for the same alleged behavior by defendants.

Defendants BNSF Railway Company ("BNSF"), CSX Transportation, Inc. ("CSX"), Norfolk Southern Railway Company ("NS"), and Union Pacific Railway Company ("UP") moved to dismiss the claims of both putative classes. The Court denied defendants' motion to dismiss the direct purchasers' complaint on November 1, 2008. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, Misc. No. 07-489, 2008 U.S. Dist. LEXIS 95456 (D.D.C. Nov. 7, 2008). The indirect purchaser plaintiffs' (hereafter "plaintiffs") complaint, and defendants' challenge to it, are discussed in this Opinion.[2]

II. STANDARD OF REVIEW

Defendants move to dismiss all of plaintiffs' claims for failure to state a claim upon which relief can be granted under [*33]Rule 12(b)(6) of the Federal Rules of Civil Procedure. They also move to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that plaintiffs lack standing.

A. Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows dismissal of a complaint if a plaintiff fails "to state a claim upon which relief can be

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[2] The putative indirect purchaser plaintiff class is represented by Agway Liquidating Trust; Fayus Enterprises; and Maroon Incorporated.

granted." FED. R. CIV. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court clarified the standard of pleading that a plaintiff must meet in order to survive a motion to dismiss under Rule 12(b)(6). The Court noted that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests[.]'" *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007); *Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C.Cir.2008). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to provide the "grounds" of "entitle[ment] to relief." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1964-65; *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986). While there is no "probability requirement at the pleading stage," *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965, "something beyond ... mere possibility ... must be alleged[.]" *Id.* at 1966. The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level," *id.* at 1965, or must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 1974. The Court referred to this newly clarified standard as "the plausibility standard." *Id.* at 1968 (abandoning the "no set of facts" language from *Conley v. Gibson*).

On a motion to dismiss under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S.Ct. at 2200; *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1965; *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991); *Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d at 15. It must construe the complaint "liberally in the plaintiffs' favor, and grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *see also Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d at 15. The Court, however, need not accept inferences drawn by plaintiffs if those inferences are unsupported by facts alleged in the complaint; nor must it accept plaintiffs' legal conclusions. *See Kowal v. MCI Communications Corp.*, 16 F.3d at 1276; *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

B. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction. They therefore may hear only cases entrusted to them by a grant of power contained in either the Constitution or in an act of Congress. *See, e.g., Beethoven.com L.L.C. v. Librarian of Congress*, 394 F.3d 939, 945 (D.C. Cir. 2005); *Best v. United States*, 522 F. Supp. 2d 252, 254 (D.D.C. 2007); *Srour v. Barnes*, 670 F. Supp. 18, 20 (D.D.C. 1987) (citing *City of Kenosha v. Bruno*, 412 U.S. 507, 511 (1973)). Under Rule 12(b)(1), the plaintiffs bear the

burden[*34] of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007) (citing *Georgiades v. Martin-Trigona*, 729 F.2d 831, 833 n. 4 (D.C. Cir. 1984)). In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all of the factual allegations in the complaint as true. The Court, however, need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must it accept plaintiffs' legal conclusions. *See Best v. United States*, 522 F. Supp. 2d at 255; *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 47 (D.D.C. 2003).

III. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that in 2003, the four defendants, who control approximately ninety percent of all rail freight traffic in the United States, sought to increase their revenues through the use of fuel surcharges. Compl. ¶¶ 2-3, 43. Before Congress passed the Staggers Rail Act in 1980, defendants would have had to apply to the Interstate Commerce Commission for approval of an across-the-board rate increase. Compl. ¶¶ 4, 55. Following deregulation of the railroad industry, however, at least eighty percent of all rail shipments move under private transportation contracts, which are not rate regulated, or are otherwise exempt from rate regulation. Compl. ¶¶ 56. Plaintiffs allege that defendants de-

termined that the most efficient means to increase their profits was through the imposition of an across-the-board artificially high and uniform fuel surcharge. Compl. ¶¶ 60.

The barrier to this plan, according to plaintiffs, was that many rail freight transportation contracts already included rate escalation provisions that weighted a variety of cost factors, including fuel, based on an index called the All Inclusive Index (the "AII"). Compl. ¶¶ 11, 61. The railroad trade organization known as the Association of American Railroads ("AAR"), which is dominated by the four defendants, publishes this index. Compl. ¶¶ 12, 61. Plaintiffs allege that the AII (as well as a related cost index called the Rail Cost Adjustment Factor ("RCAF")) already accounted accurately for the impact of fuel cost increases. Compl. ¶¶ 5, 61. Any actual increase in fuel costs, no matter how large, would be reflected in the AII and the RCAF. Compl. ¶¶ 61. Plaintiffs allege that the defendants conspired to remove fuel from the AII so that they could apply a separate "fuel surcharge" as a percentage of the total cost of freight transportation. Compl. ¶¶ 62. Doing so permitted plaintiffs to raise total freight prices widely by a given percentage. *Id.*

According to plaintiffs, top executives from each of the defendants met regularly at various industry conferences and events in the spring of 2003 and thereafter to discuss their industry. Compl. ¶¶ 64. Shortly after one such industry meeting, in July 2003, the western railroads (BNSF and UP) began charging identical fuel surcharges based on the U.S.

Department of Energy On-Highway Diesel Fuel Price Index. Compl. ¶¶ 16, 65. Plaintiffs allege that this parallel and complex pricing decision was based on an agreement among the defendants. Compl. ¶¶ 66-69.

The next step in the alleged conspiracy, according to plaintiffs, was the defendants' agreement and collective action to cause the AAR to create a new cost escalation index, the All Inclusive Index Less Fuel ("AIILF"), which removed fuel costs from the prior cost escalation index (the AII). Compl. ¶¶ 72. According to plaintiffs, defendants[*35] reached this agreement during the October and December 2003 meetings of the AAR. Compl. ¶¶ 71. The index was published in December 2003. Compl. ¶¶ 72. Subsequently, and in furtherance of the conspiracy, according to plaintiffs, the eastern railroads (CSX and NS) announced that they would apply identical fuel surcharges based on the West Texas Intermediate Index. Compl. ¶¶ 75-77.

Plaintiffs allege that at that point, and as a result of these collective actions, defendants each applied their fuel surcharges in the same way – as a percentage multiplier of the total base rate for rail freight transportation. Compl. ¶¶ 84. They were able to do so because, under the AIILF, fuel was no longer included in the general cost escalation index. Plaintiffs allege that this approach yielded defendants billions of dollars of additional profits because the surcharge raised rates far beyond the real increased cost of fuel. Compl. ¶¶ 81-83, 91. Plaintiffs allege that defendants, in the east and west, coordi-

nated their computation of the surcharges. Compl. ¶¶ 89. As a result of this alleged collusion, the eastern and western railroads, respectively, imposed identical fuel surcharges for more than three years. Compl. ¶¶ 89.

In sum, relying on the uniformity of fuel surcharges, the creation and use of the AHLF, and various other allegations, plaintiffs contend that defendants conspired to fix prices in violation of Section 1 of the Sherman Act as well as the antitrust, consumer protection and unjust enrichment laws of various states. Plaintiffs furthe[illegible]llege that as a result, the members of the plainti[illegible]lass have all paid higher prices for unregulated rail freight transportation than they would have absent this asserted unlawful activity. Compl. ¶¶ 26, 112. Defendants have moved to dismiss on the grounds that plaintiffs have not met the *Twombly* pleading standard; that plaintiffs' state law claims are all preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"); that plaintiffs lack standing under Article III to claim violations of the laws of states in which they do not reside or do business; that plaintiffs have failed to demonstrate that they have "antitrust standing;" and that plaintiffs' unjust enrichment and consumer protection claims fail on a number of grounds.

IV. ANALYSIS

The complaint alleges both federal and state antitrust claims as well as state consumer protection and unjust enrichment claims. Plaintiffs must pur-

sue the state claims in order to recover damages, because following *Illinois Brick v. Illinois*, 431 U.S. 720, 746-47 (1977), only direct purchasers may obtain damage awards under federal antitrust law. As explained in further detail below, the Court finds that the plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Plaintiffs' federal antitrust claim survives, however, because they have met the pleading standard enunciated by the Supreme Court in *Twombly* and have standing to pursue their claim for injunctive relief.

A. The Twombly Standard

Defendants argue that the complaint does not meet the pleading standard for federal or state antitrust claims as articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). The Court previously found that the direct purchaser plaintiffs' allegations, which are substantially similar to the indirect purchasers' allegations, met the *Twombly* standard. It therefore denied defendants' motion to dismiss the direct purchasers' claims on November 7, 2008. *See* **[*36]***In re Rail Freight Fuel Surcharge Antitrust Litig.*, Misc. No. 07-489 2008 U.S. Dist. LEXIS 95456 at *18-19, 23-26 (D.D.C. Nov. 7, 2008). The defendants do not raise any additional or different arguments as to why the indirect purchaser plaintiffs' complaint should not be allowed to proceed under *Twombly*. For the same reasons explained in the Court's earlier Opinion, the Court finds that the indirect purchasers' complaint

states claims under *Twombly*, and it therefore will not dismiss their complaint on those grounds. *Id.*

B. Federal Preemption of State Law Claims

Defendants argue that plaintiffs' state antitrust, consumer protection and unjust enrichment claims are preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.* The preemption clause in ICCTA provides:

> The jurisdiction of the [Surface Transportation] Board over – (1) transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 *et seq.*] *with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers*; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part [49 U.S.C. §§ 10101 *et seq.*], the remedies provided under this part [49 U.S.C. §§ 10101 *et seq.*] *with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added).

Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. A federal statute preempts state law when (1) the preemptive intent is "'explicitly stated in the statute's language or implicitly contained in its structure and purpose'"; or (2) the state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotations and citations omitted). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* at 516 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *see also Altria Group, Inc. v. Good*, No. 9127, 2008 U.S. LEXIS 9127 at *10 (U.S. Dec. 15, 2008).

The preemption language in ICCTA is plain and explicit: The remedies provided "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). "The language of the statute could not be more precise." *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001). *See also Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1128-29 (10th Cir. 2007); *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2d Cir. 2005); *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998). "The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act are the only remedies available as to the regulation of rail transportation,

and that the [*37] federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise." *CSX Transp. v. Georgia PSC*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Indeed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Id.*

While the enactment of ICCTA was the culmination of a movement toward deregulation of the railroads that began in the late 1970's, Congress did not intend that the states fill the regulatory void.[3] The regulation of railroad operations had always been "a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm." *Friberg v. Kan. City S. Ry.*, 267 F.3d at 443; *see also City of Auburn v. United States*, 154 F.3d at 1029.[4] Thus, as

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[3] Congress began deregulating the industry in the late 1970's, first with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1980, followed shortly thereafter by the Staggers Rail Act of 1980. *See City of Auburn v. United States*, 154 F.3d at 1029 & n. 6. Congress enacted ICCTA in order to complete the railroad deregulation that the earlier statutes had begun. *See* S. REP. NO. 104-176, at 5 (1995) ("the bill continues the deregulation theme of the past 15 years by providing further regulatory reductions in the surface transportation industries.").

[4] Plaintiffs argue that there is always a presumption against finding preemption. Certainly this is true when Congress has legislated in a field the states have traditionally occupied. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Conversely,

numerous courts have held, ICCTA preempts the economic regulation of railroads by the states, as well as state laws whose application would unreasonably interfere with a railroad's operations. *See PCS Phosphate Co. v. Norfolk Southern Corp.*, 520 F. Supp. 2d 705, 715 (E.D.N.C. 2007) (collecting cases). As the Third Circuit put it, "the Termination Act does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). The question is always whether the action "would have the effect of preventing or unreasonably interfering with railroad transportation." *PCS Phosphate Co. v. Norfolk Southern Corp.*, 520 F. Supp. 2d at 715.

The states retain their traditional police powers to protect health and safety, which is reserved to them by the Constitution, but only so long as the ap-

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the federal government's historic regulation of the railroad system counsels against such a presumption in this case. *See CSX Transp. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) ("the case for preemption is particularly strong where, as here [rail transportation], 'the State regulates in an area where there has been a history of significant federal presence'") (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *see also Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1327-28.

plication of these powers is not unreasonably burdensome on railroad operations. *See, e.g., Green Mt. R.R. Corp. v. Vermont*, 404 F.3d at 642 ("Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to **[*38]** withstand preemption."); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1339 (application of local zoning laws to a company leasing railroad property was not preempted by ICCTA because "the zoning ordinances with which [the lessee] must comply, do not burden [the railroad] with the patchwork of regulation that motivated the passage of the ICCTA."); *Maumee & W.R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, S.T.B. Dkt. No. 34354, 2004 WL 395835, at *1 (S.T.B. Mar. 2, 2004) (localities retain certain police powers to protect health and safety so long as they do not interfere with interstate rail operations).

To permit plaintiffs to pursue their state antitrust, consumer protection, and unjust enrichment claims against defendant railroads in this case, however, is not the least bit similar to the exercise by states of these non-burdensome police powers through state laws whose application are remote from railroad operations. Rather, for this Court to resolve plaintiffs' claims would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been – creating just the

patchwork of railroad regulation that ICCTA sought to preempt. As the Senate noted when it enacted ICCTA in 1995:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

See S. REP. NO. 104-176, at 6 (1995).

Plaintiffs also argue that because Section 10501(b) establishes both the STB's jurisdiction as well as the preemptive effect of its decisions and remedies, any claims arising out of private railroad contracts (such as the claims at issue here) are not within the STB's statutory authority and therefore could not be preempted. This argument confuses the STB's jurisdiction with the scope of federal preemption and assumes that Congress would not have allowed ICCTA to leave a regulatory void. The argument is not supported by either the statute's language or its legislative history. The Senate Report expressly stated that "nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill." S. REP. NO. 104-176, at 6 (1995). Similarly, the Conference Committee noted

that "integrated into the statement of general jurisdiction is the delineation of the exclusivity of federal remedies with respect to the regulation of rail transportation." H.R. CONF. REP. NO. 104-422, at 168 (1995). And the courts that have considered the matter have recognized that through its deregulation of the railroads, Congress purposely left potential plaintiffs without a federal remedy. As one of the first courts to consider ICCTA explained:

> Defendants, however, read the ICC Termination Act's preemption clause to preempt state remedies only when federal remedies are provided under the Act.... Defendants' argument reflects a misunderstanding not only of the plain language of section 10501(b)(2), but also of the ICC Termination Act generally. The most natural reading of section 10501(b)(2) is that the federal remedies provided by the ICC Termination Act [*39] are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the ICC Act has expressly provided otherwise.

CSX Transp. v. Georgia PSC, 944 F. Supp. at 1581.

Congress has created similarly broad preemption in other industries. Airlines are a prime example – like railroads, the operation of airlines is necessarily between states, indeed, nationwide. Congress recognized in the Airline Deregulation Act ("ADA") that any regulation of the airlines by individual states

would create significant problems, and so it prohibited the enactment or enforcement of state laws or regulations "related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1) (previously 49 U.S.C. § 1305(a)(1)), which the Supreme Court concluded preempted even state laws of general applicability because they "relate to" the airline industry:

> [P]etitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language.

Morales v. Trans World Airlines, 504 U.S. 374, 386 (1992). *See also Altria Group, Inc. v. Good*, 2008 LEXIS 9127 at *26 ("the phrase 'relating to' indicates Congress' intent to pre-empt a large area of state law to further its purpose of deregulating the airline industry"). One court expressly held that the ADA preempted the application of state antitrust and consumer protection laws to airlines setting of fares because they "relate to ... a price of an air carrier." *In re Korean Air Lines Co., Ltd., Antitrust Litig.*, 567 F. Supp. 2d 1213, 1220 (C.D.Cal. 2008). With simi-

larly broad language, ICCTA preempts state laws with "respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Plaintiffs' challenges to defendants' rates and rate practices under state antitrust, consumer protection and unjust enrichment laws implicate a core concern of the ICCTA – the regulation of "economics and finances of the rail carriage industry," and, just as with the airline industry, such regulation by the states is preempted. *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d at 252.

Plaintiffs nevertheless argue that ICCTA does not preempt state regulation of contract traffic exempted by Congress from STB regulation under another section of the statute, 49 U.S.C. § 10709. Section 10709(c)(1) states that "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to this part [49 U.S.C. §§ 10101 *et seq.*], and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part [49 U.S.C. §§ 10101 *et seq.*]." 49 U.S.C. § 10709(c)(1). Plaintiffs rely on the "shall not be subject to this part" language for their argument that ICCTA's preemption clause does not apply to any contract traffic, and thus does not apply to any of plaintiffs' claims, all of which involve contract traffic. But plaintiffs have not cited, nor has the Court discovered, any case that interprets the interplay between Sections 10501 and 10709 in the manner plaintiffs suggest, and the Court is not persuaded by plaintiffs' arguments. Read in its **[*40]**

entirety, the sentence makes clear that Congress intended it to mean only that the STB has no regulatory authority over contract claims, not to create an opportunity for state regulation.

To read the "shall not be subject to this part" language as eliminating ICCTA preemption for all contract traffic would be inconsistent with congressional intent. Contract traffic, or otherwise unregulated traffic, accounts for eighty percent of all rail freight traffic. Compl. ¶ 56. Through its enactment of ICCTA, Congress intended that "the Federal scheme of economic regulation and deregulation [of the railroads] ... address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. REP. NO. 104-311, at 95-96 (1995). Interpreting Section 10709(c) as exempting eighty percent of rail traffic from federal preemption opens that traffic up to the risk of pervasive state regulation of "rates" and "practices," and would make it impossible for uniform federal standards to govern railroad operations.

Nor does Section 10709(c)(2)'s references to lawsuits in court, and not before the STB, as the exclusive remedy for alleged breaches of contract by railroads mean that all claims against railroads arising from shipments governed by contract may be brought in federal courts. Under Section 10709(c)(2), courts may rule on breach of contract claims against

railroads, a grant of jurisdiction that is necessary for any industry to function. Ensured enforcement of contracts is a basic premise of our economic system. But plaintiffs are not seeking contractual remedies here. Plaintiffs' desired remedies, through their state antitrust, consumer protection and unjust enrichment claims, are extra-contractual. To allow shippers access to extra-contractual state law remedies against a railroad, simply because they have a contract with the railroad, would gut the purposes of ICCTA.

Plaintiffs' argument concerning ICCTA's evidentiary savings clause, 49 U.S.C. § 10706(a)(3)(B)(ii), is similarly unavailing. The savings clause includes the phrase, "[i]n any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from [certain kinds of evidence]." 49 U.S.C. § 10706(a)(3)(B)(ii). By this section, Congress provided railroads with certain evidentiary protections, but these protections cannot be transformed into a grant of authority for the enforcement of state antitrust laws that are preempted by ICCTA's express preemption clause. Had Congress intended that the entire body of state antitrust law not be preempted by Section 10501(b), it would not have created the exception so tangentially. The Court will not rely on plaintiffs' interpretation of this one clause as adequate counterweight to the plain language in Section 10501(b), as well as the

run of legislative history and of judicial decisions on ICCTA preemption.

For these reasons, the Court concludes that all of plaintiffs' state law claims are preempted by ICCTA and must be dismissed. Because the Court finds the state claims are preempted as a matter of law, it need not reach the issue of whether the named plaintiffs would have standing to bring state laws claims for states in which they do not reside.[5]

[*41]*C. Standing*

The indirect purchaser plaintiffs' remaining claim is a federal antitrust claim for injunctive relief. The Supreme Court's decision in *Illinois Brick* prohibits claims for damages, but not those for injunctive relief, by indirect purchasers under federal antitrust law. *See Illinois Brick v. Illinois*, 431 U.S. 720, 746-47 (1977). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 592-94 (3d Cir. 1979). Defendants contend that although *Illinois Brick* does not bar plaintiffs' claim for injunctive relief, the claim is barred on other standing grounds and must be dismissed for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants specifically allege that (1) the indirect purchaser plaintiffs fail to allege injury resulting from the conspiracy described in the

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[5] Nor need the Court decide whether a dismissal on preemption grounds is a dismissal for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure or for failure to state a claim under Rule 12(b)(6).

complaint, and (2) any resulting injunction would be duplicative of the results that may be achieved by the direct purchaser plaintiffs.

The essential standing question for antitrust claims for injunctive relief is whether the plaintiffs have alleged an antitrust injury – namely a "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977)). Defendants argue that *Associated General Contractors v. Cal. State Council of Carpenters ("AGC")* which established a multi-factor test to determine whether federal antitrust plaintiffs met prudential standing requirements, governs plaintiffs' standing. *See Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).[6] The indirect purchaser plaintiffs are correct, however, that the "efficient enforcement factors" identified in *AGC* do not apply to claims for injunctive relief. As the Supreme Court stated in *Cargill*:

> [I]n *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner

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[6] The *AGC* factors include: (1) the nature of the plaintiff's alleged injury; (2) the directness of the injury; (3) the risk of duplicative recovery; and (4) the complexity of the apportionment of damages. *Associated General Contractors v. Cal. State Council of Carpenters ("AGC")*, 459 U.S. at 542-44.

> was a proper plaintiff under § 4 [of the Clayton Act for damages].... [H]owever, many of these other factors are not relevant to the standing inquiry under § 16 [of the Clayton Act for an injunction].") .... ['The relevant inquiry under Section 16 is whether plaintiffs have alleged an antitrust injury because] the only remedy available is equitable in nature.... [S]tanding under § 16 raises no threat of multiple lawsuits or duplicative recoveries [once an injunction is imposed].

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 at 110-11 & nn. 5-6.

The complaint alleges that "[p]laintiffs and the Class have suffered injury, and will continue to suffer injury in their business or property, proximately caused by Defendants' unlawful conduct, in that they have paid supra-competitive prices for Rail Fuel Surcharges applied to unregulated rail freight transportation services during **[*42]** the Class Period." Compl. ¶ 120. Unlike in the cases cited by defendants, where the alleged injuries harmed a single competitor, through their allegations identifying defendants' supra-competitive prices, plaintiffs here have alleged an injury to competition itself. *See, e.g., Dial A Car v. Transportation, Inc.*, 884 F. Supp. 584, 588 (D.D.C. 1995), *aff'd in part, rev'd in part* 82 F.3d 484 (D.C. Cir. 1996). This is precisely the sort of injury that the antitrust laws are intended to protect against. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. at 115 ("The antitrust laws ... were enacted for 'the protection of

competition, not *competitors*'") (citations omitted) (emphasis in original); *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355, 364 (D.N.J. 2001) ("Where ... it is alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted.").

Once plaintiffs have alleged an antitrust injury, they must also allege a causal connection between the prohibited behavior and their injury, a requirement common to standing for all plaintiffs. *See Arden Wood, Inc. v. United States Citizenship & Immigration Servs.*, 480 F. Supp. 2d 141, 147 (D.D.C. 2007) ("[s]tanding is an Article III requirement under which the plaintiffs must show, at an 'irreducible constitutional minimum': (1) that they have suffered an injury in fact – the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and (3) that a favorable decision on the merits likely will redress the injury.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). *See also Weaver's Cove Energy, LLC v. State of Rhode Island Dep't of Envtl. Mgmt.*, 524 F.3d 1330, 1332-33 (D.C. Cir. 2008).

Defendants argue that the indirect purchasers fail to allege the necessary causal connection between the charged conspiracy and their injury. In fact, however, the indirect purchasers allege:

> Agway has been in the business of shipping farm products to various customs clearance

yards in Chicago, Illinois and Detroit, Michigan, transferring those products to storage facilities, and re-shipping product from these storage facilities to customers of Agway. Agway purchased unregulated freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel surcharges indirectly to Defendants.

* * *

... During the Class Period, Fayus was a California-based wholesale and retail outlet for African and Caribbean food products servicing a diverse clientele ranging from small independent restaurants, institutional food-service establishments as well as supermarkets and grocery stores.

* * *

... At all relevant times during the Class Period, Maroon has been in the business of shipping chemical products to various customs clearance yards ... transferring those products to storage facilities, and re-shipping said products from said storage facilities to customers of Maroon.... Maroon purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

* * *

> ... [Plaintiffs] purchased unregulated rail freight transportation indirectly from [*43] one or more of the Defendants during the Class Period, and during the Class Period one or more of the Defendants assessed Rail Fuel Surcharges on Plaintiffs in connection with that unregulated rail freight transportation. The prices Plaintiffs paid to Defendants for unregulated rail freight transportation services on which Rail Fuel Surcharges were imposed were greater than the prices Plaintiffs would have paid absent the conspiracy alleged herein.

Compl. ¶¶ 28-31. Defendants' challenges to these allegations are essentially that plaintiffs purchased the rail freight services *indirectly*, a fact which, as discussed above, does not, on its own, invalidate their claims for injunctive relief.[7] Plaintiffs have alleged an antitrust injury caused by these asserted antitrust violations which their desired injunction may ameliorate; and they have alleged adequate factual detail to trace the injury to defendants' allegedly collusive activities. The Court finds that they have

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[7] Defendants' reliance on *O.K. Sand & Gravel v. Martin Marietta Technologies* for the required amount of factual detail that must be pled for antitrust standing is misplaced. The court there considered whether the plaintiff had produced enough evidence *at trial* to support the verdict, not what a plaintiff must plead to make the initial showing of standing. *See O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565, 573 (7th Cir. 1994).

adequately alleged both antitrust injury and standing.

Defendants further argue that regardless of whether plaintiffs would otherwise have standing, the Court should dismiss their federal claims on equitable grounds. Doing so, according to defendants, would eliminate the possibility that the indirect purchaser plaintiffs' desired injunction would be duplicative of the injunction that the direct purchaser plaintiffs seek, would protect defendants against the payment of attorneys' fees to two sets of lawyers and would promote judicial economy. The Court recognizes the possibility that allowing both the direct and indirect purchasers to proceed with their cases may result in some inefficiency. Because the outcome of the direct purchasers' case is not yet determined, however, it is not yet known whether allowing the indirect purchasers to proceed will actually be inefficient. There is no assurance at this point that the direct purchasers will obtain an injunction against defendants. And none of the cases cited by defendants supports dismissing plaintiffs' claims before the potentially duplicative injunction is in place. Furthermore, it is possible that a settlement agreement could be reached between defendants and the putative direct purchaser class, a realistic possibility given that the direct purchasers' claims for money damages are viable. Even if they do not settle before trial, the two putative classes have different attorneys and may pursue different strategies during discovery or at trial, all of which may result in different outcomes. In short, the Court

finds that it would be premature to dismiss the indirect purchasers' federal claim on equitable grounds at this point.

V. CONCLUSION

For these reasons, the Court will grant defendant's motion to dismiss in part and will deny it in part. Plaintiffs' state law claims will be dismissed. Their federal antitrust claim for injunctive relief will not be dismissed. A separate Order consistent with this Opinion shall issue this same day.

SO ORDERED.

Date: 12/31/08

/s/
Paul L. Friedman
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT DIRECT PURCHASER PLAINTIFFS	

ORDER

This matter is before the Court on defendants' motion to dismiss the indirect purchaser plaintiffs' amended class action complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure and for lack of subject matter jurisdiction under Rule 12(b)(1). Upon careful consideration of the parties' arguments in their papers and the oral arguments presented by counsel before the Court on October 10, 2008, and for the reasons explained in the Court's separate Opinion issued this same day, the Court concludes that the motion to dismiss must be granted as to the indirect purchaser plaintiffs' state law claims and must be denied as to their fed-

eral antitrust claim for injunctive relief. Accordingly it is hereby

ORDERED that defendants' motion to dismiss [107] is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that all of the indirect purchaser plaintiffs' state law claims are DISMISSED. The case will proceed with respect to plaintiffs' federal antitrust claim for injunctive relief.

SO ORDERED.

Dated: 12/31/08

/s/
PAUL L. FRIEDMAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	MDL Docket No. 1869 Misc. No. 07-489 (PLF)
This document relates to: INDIRECT PURCHASER PLAINTIFFS	

ORDER

ORDER GRANTING INDIRECT PURCHASER PLAINTIFFS' UNOPPOSED MOTION FOR ENTRY OF FINAL JUDGMENT OF COUNTS II-IV AND FOR A STAY OF THE PROCEEDINGS WITH RESPECT TO COUNT I

Indirect Purchaser Plaintiffs Agway Liquidating Trust, Fayus Enterprises, and Maroon Incorporated having moved for entry of final judgment pursuant to Fed. R. Civ. P. 54(b) of the Court's December 31, 2008 dismissal of Counts II-IV of the Consolidated Class Action Complaint, and to stay proceedings on Count I pending the resolution of Plaintiffs' appeal of Counts II-IV, and there being no just reason for delay and for other good cause shown, it is hereby ORDERED, that:

1. Final judgment is entered on Counts II, III, and IV; and

2. Proceedings on Count I are stayed pending a decision on an appeal from the judgment entered on Counts II, III, and IV.

Dated: 1/16/09

/s/
Hon. Paul L. Friedman
United States
District Court Judge

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 49, United States Code: Transportation.
Subtitle IV: Interstate Transportation.
Part A: Rail.

Section 10101:

In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

. . .

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense . . . .

Section 10102:

In this part –

. . .

(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

. . .

(9) "transportation" includes –

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

Section 10501(b):

The jurisdiction of the Board over –

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Section 10706(a)(2) & (3):

> (2)(A) A rail carrier providing transportation subject to the jurisdiction of the Board under this part that is a party to an agreement of at least 2 rail carriers that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Board for approval of that agreement

under this subsection. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Board approves the agreement, it may be made and carried out under its terms and under the conditions required by the Board, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9) and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the Board may not approve or continue approval of an agreement when the conditions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

(B) The Board may approve an agreement under subparagraph (A) of this paragraph only when the rail carriers applying for approval file a verified statement with the Board. Each statement must specify for each rail carrier that is a party to the agreement –

(i) the name of the carrier;

(ii) the mailing address and telephone number of its headquarter's office; and

(iii) the names of each of its affiliates and the names, addresses, and affiliates of each of its officers and directors and of each person, together with an affiliate, owning or controlling any debt, equity or security interest in it having a value of at least $1,000,000.

(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not –

(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single-line rates proposed by another rail carrier, except that for purposes of general rate increases and broad changes in rates, classifications, rules, and practices only, if the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless

that rail carrier practicably participates in the movement; or

(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route. If the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part.

(B)(i) In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a

party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement –

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of subclause (I) or (II) are satisfied before allowing the introduction of any such evidence.

(C) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Board and made available to

other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code.

Section 10709(a), (b) & (c):

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION	Civil Docket No.1:07-mc-00489 PLF
	MDL 1869
This Document Relates to:	**INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT**
ALL CASES	**DEMAND FOR JURY TRIAL**

Plaintiffs Agway Liquidating Trust, Fayus Enterprises, and Maroon Incorporated, individually and on behalf of a class of all those similarly situated, bring this action for damages and injunctive relief under federal antitrust law and state antitrust and consumer protection law and alleges as follows:

NATURE OF THE ACTION

1. This is an antitrust class action charging four United States-based Class I railroads, Union Pacific Railroad Company, BNSF Railway Company, CSX Transportation, Inc., and Norfolk Southern Railway Company (collectively, "Defendants") with price fixing in violation of Section 1 of the Sherman Act as well as in violation of state antitrust laws and state consumer protection laws. Plaintiffs bring this action on behalf of themselves and an alleged class of indirect purchasers who purchased unregulated rail freight transportation services from Defendants from July 1, 2003 to the present (the "Class Period," which will also include the period from the date of this filing to the date of class notice) and who were assessed a rail fuel surcharge ("Rail Fuel Surcharge") for the agreed-upon transportation. As used herein, the term "unregulated" refers to rail freight transportation services where the rates are set by private contracts or through other means exempt from rate regulation under federal law.

2 Defendants conspired to fix, raise, maintain, and/or stabilize prices of rail freight transportation services sold in the United States

through use of Rail Fuel Surcharges added to customers' bills. A Rail Fuel Surcharge is a separately identified fee that is charged by Defendants, purportedly to compensate for increases in the cost of fuel, for the agreed-upon transportation.

3. Defendants collectively control over 90 percent of the rail freight traffic in the United States. According to an economic analysis on Railroad Fuel Surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter of 2007.

4. In the early 2000s, the Defendants sought to increase their revenues by raising prices. However, unlike in the past era of full regulation of the railroad industry, when the railroads could have applied to the Interstate Commerce Commission (the "ICC") for across-the-board rate increases, the railroads now no longer could do so as a result of deregulation that began with the Staggers Rail Act of 1980 in the early 1980s. Given deregulation, the only practicable way the railroads now could increase prices across-the-board was through the mechanism of a uniform surcharge applied to as many purchasers of rail freight transportation services as possible.

5. Defendants BNSF Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., and Norfolk Southern Railway Company – which together control about 90% of rail freight

traffic in the United States – conspired in 2003 to use an artificially high surcharge, purportedly to cover fuel costs, as the means to raise rates across the board, and thereby increase profits. But this plan faced a significant hurdle: as of 2003, the great majority of rail freight transportation agreements included rate escalation provisions that weighted a variety of cost factors, including fuel, based on an index called the "AII" or "All Inclusive Index," published by the railroad trade organization known as the Association of American Railroads (the "AAR"). The AII (and a related index called the Rail Cost Adjustment Factor (the "RCAF") that was based on the AII) already permitted full recovery by the railroads of actual fuel cost increases, no matter how large. By weighting different cost factors, the AII and related RCAF accounted accurately for the impact of particular cost increases (e.g., for fuel). James R. Young, the President of UP, acknowledged during an October 2004 earning call that the RCAF "looks at actual costs through the industry."

6. To overcome this obstacle, Defendants devised and embarked on a scheme to remove fuel from the AII, so that a separate "fuel surcharge" could then be applied as a percentage against the total cost of the freight transportation. This permitted these major railroads to achieve their desired, and mutually agreed, result: an effective percentage rate increase that could be broadly applied to rail freight customers.

7. Defendants executed their conspiracy through a number of collective actions as described below.

8. In July 2003, the two major western railroads, Defendants BNSF Railway Company and the Union Pacific Railroad Company, both started charging the exact same fuel surcharge. Up until this time, Rail Fuel Surcharges were only intermittently applied, and the Defendants had different Rail Fuel Surcharge rates, reflecting, among other things, that each Defendant had different fuel costs. In July 2003, however, BNSF Railway Company and Union Pacific Railroad Company began to move in lockstep, each now basing their fuel surcharge on the U.S. Department of Energy (DOE) On-Highway Diesel Fuel Price Index (the "HDF Index"). At this time, the HDF Index was at a higher rate than the West Texas Intermediate Crude Oil Index (the "WTI Index"), which Union Pacific previously had been utilizing. Defendants BNSF Railway Company and Union Pacific Railroad Company have remained in lockstep, using the HDF Index, through the present.

9. These actions by defendants BNSF Railway Company and Union Pacific Railroad Company, however, were not sufficient to permit widespread use of Rail Fuel Surcharges as a revenue-raising mechanism because most private contracts still had cost escalation provisions that included fuel costs as a factor, meaning that a separate Rail Fuel Surcharge could not also readily be used.

10. In late 2003, Defendants solved this problem through collective action. Defendants caused the AAR, a trade organization that is controlled and dominated by Defendants, to develop and publish a new index with fuel removed as an element of cost escalation.

11. In contrast, the then-existing standard cost escalation indices – the AAR's All-Inclusive Index (the "AII"), and RCAF based on the AII – each accounted for a variety of cost factors, including fuel. Furthermore, the RCAF and AII weighted these different factors so that each index would account accurately for the impact of particular cost increases (e.g., for fuel). Thus, prior to late 2003, any actual increase or decrease in fuel costs, no matter how large, could be captured in the RCAF and AII. In other words, *there was no need to remove fuel from the existing indices in order to recover any fuel cost increases*.

12. Pursuant to Defendants' agreement and collective action, the AAR announced in December 2003 announced that a new index, the All Inclusive Index Less Fuel ("AII-LF"), was being established. This new index was unlike the RCAF and AII in that the new index excluded fuel. Also unlike the RCAF, the new AII-LF was not subject to review by the Surface Transportation Board ("STB"). The AAR's official publication, entitled *AAR Railroad Cost Indexes* announced: "This issue of AAR Railroad Cost Indexes inaugurates a new index: the All-Inclusive Index Less Fuel. This index is calculated using the same components and methods as the All-

Inclusive Index uses for the Rail Cost Adjustment Factor, *with the exception of the exclusion of the fuel component*." (emphasis supplied). This announcement, and the underlying removal of fuel from the AII and RCAF, were the *collective action* of the Defendants, which dominate and control the AAR. Moreover, the AAR could not have taken these steps without collective action by the Defendants. As an illustration, senior officer of Defendant BNSF admitted in 2004 that BNSF Chairman, President and CEO Matthew K. Rose "led the charge on" the AAR's adoption of the new index without a fuel cost component.

13. Importantly, the AAR had never before established a cost escalation index without a fuel cost component. In a July 2007 interview, Defendant UP's James R. Young ("Young") acknowledged the new Rail Fuel Surcharges, as applied to rail freight transportation services, were "really unique to the railroad industry. Three, four years ago they were really non-existent."

14. Through Defendants' collective action, the AAR's implementation of this new index in December 2003 provided Defendants the ability to apply, and Defendants, in fact, did apply, Rail Fuel Surcharges more broadly than before, since fuel would no longer automatically be covered by standard rate escalation clauses.

15. Defendant UP's Young admitted, during an October 2004 earnings call, that UP was now "getting away from the RCAF" and "putting in the

specific fuel recovery mechanism in areas that historically would have used RCAF." According to Young, by July 2007, approximately "80 to 90 percent" of UP's business had "some kind of fuel surcharge mechanism that gets passed on to the customer."

16. Almost immediately after the AAR announcement, the two major eastern railroads – Defendants CSX Transportation, Inc. and Norfolk Southern Railway, Inc., each of which had different fuel costs – in early 2004 made the identical decision that they would now use the same fuel surcharge rates and that these surcharges would be based on the WTI Index (which, in early 2004, was at a higher rate than the HDF Index that the Western Railroads simultaneously started to use in July 2003). As with the Western Railroads, the Eastern Railroads previously had different fuel surcharges (reflecting, among other things, their different fuel costs). This identical decision by the Eastern Railroads, coming on the heels of the Defendants' collective action in late 2003 to remove fuel from the AII and RCAF, eliminates any reasonable possibility that the Eastern Railroads decided independently to use the WTI Index in early 2004.

17. Like the Western Railroads, the Eastern Railroads remained in complete lockstep, applying the exact same fuel surcharges, through at least June 2007.

18. With the AII-LF in place, the Defendants were able to use the Rail Fuel Surcharges as a reve-

nue-generating, rather than cost-recovery, mechanism because the Defendants each applied the fuel surcharge the same way: as a percentage multiplier of the *total* base rate for the rail freight transportation. That is, while the fuel factor in the AII and RCAF had been "weighted" to reflect the relative impact of fuel costs as compared to other cost factors, when fuel was removed from the new AII-LF index, the Defendants applied the percentage increase in fuel costs triggered by the applicable index to the *entire* cost of the freight transport. Thus, if the percentage increase triggered by the applicable fuel index was, for example, 15%, then by applying the fuel surcharge the Defendants would raise the entire cost of the freight transport by 15% – even though fuel accounted for only a portion of the total rail transport cost (which is what the AII and RCAF had been designed to reflect).

19. This collective approach resulted in billions of dollars of additional profits for Defendants.

20. Defendants were able to maintain their conspiracy by uniformly computing the surcharges as a percentage of the rail freight transport base rate, and by agreeing upon common trigger points for adjusting the percentages monthly. Defendants also published their Rail Fuel Surcharges on their websites to facilitate coordination and the detection of any deviation from collusive pricing.

21. Defendants also took other collective action to enforce the conspiracy and make it effective. For example, they largely stopped entering into long-

term contracts and entered instead into contracts for periods of approximately 30 days, or with 30-day cancellation provisions, thereby making it easier to implement the fuel surcharges, which were adjusted monthly. Defendants also limited the previously prevailing practice, in circumstances where more than one railroad was involved in long-distance freight transport, of sending a customer a single bill for the entire transport. Instead, Defendants increasingly switched to having each railroad on a multi-railroad trip send a separate bill (and thus could separately impose its own fuel surcharge). This facilitated each Defendant recouping its share of the supra-competitive profits. Such a switch to separate invoicing on multi-railroad trips could be accomplished only through collective action of the Defendants. Defendants also began refusing to negotiate discounts on rail freight rates – even in circumstances where individual railroads had previously been willing to do so.

22. The collective actions of Defendants, including effectively removing fuel from the AII and RCAF by creating the new AII-LF, and moving into lockstep on fuel surcharges, cannot be explained as the result of routine market conduct to collect increasing fuel costs or even to do so more efficiently. The fuel cost component in the AII and RCAF was fully effective for recovering *actual* fuel costs. Indeed, the AII had been designed to ensure that fuel and other cost increases could be recovered, regardless of the size of the fuel cost increase. Rather, by creating a new cost index without fuel (the AII-LF), and

through their other collective actions, Defendants devised and implemented a means to impose an across-the-board rate increase for rail freight transportation services. Instead of competing on fuel prices given their differing fuel costs, Defendants collectively created the type of across-the-board rate increase that they had been able to ask the now-disbanded ICC to impose during the pre-1980 period of complete rate regulation and then lawful collective railroad pricing activities.

23. In a January 2007, the STB, which has authority over rate-regulated traffic that is not within the class alleged here, found that the rail fuel surcharges, as applied to STB-regulated freight traffic, were "unreasonable" and did not relate to the railroads' actual cost of fuel. In its ruling, the STB explained that:

> After considering all of the comments, we affirm the preliminary conclusion in the August decision that it is an unreasonable practice to compute fuel surcharges as a percentage of the base rates. Because railroads rely on differential pricing, under which rates are dependent on factors other than costs, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism. Rather, a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the

> actual increase in fuel costs for handling the particular traffic to which the surcharge is applied. Two shippers may have traffic with identical fuel costs, but if one starts out with a higher base rate (because, for example, it has fewer transportation alternatives), it will pay dramatically more in fuel surcharges.

See Surface Transportation Board Decision, Rail Fuel Surcharges (STB Ex Parte No. 661, January 26, 2007) at 6; *see also id.* at 7 ("the term 'fuel surcharge' most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is mislabeled.").

24. The STB further stated that *"[u]nder 49 U.S.C. § 10709, we have no authority to regulate rail rates and services that are governed by a contract."* *Id.* (emphasis supplied).

25. Each of the Defendants has disclosed that it has received a state grand jury subpoena and/or state grand jury inquiry concerning the Rail Fuel Surcharges. In an SEC Form 10-K dated February 22, 2008, Defendant CSX stated that "[i]n July 2007, CSXT received a grand jury subpoena from the New Jersey Office of the Attorney General seeking information related to the same fuel surcharges that are the subject of the purported class actions. It is possible that additional federal or state agencies could initiate investigations into similar matters." (CSX Corp., 10-K, February 22, 2008 at 99). In an SEC Form 10-K dated February 15, 2008, Defendant

BNSF stated that "[t]he Company is also responding to a state grand jury subpoena requesting production of information related to fuel surcharges." (BNSF Railway Company, 10-K, February 15, 2008 at 10). In an SEC Form 10-K dated February 15, 2008, Defendant Norfolk Southern stated that "NS received a subpoena from a state grand jury on July 13, 2007, requesting documents and materials relating to the setting of fuel surcharges. NS is cooperating with the state in its investigation." (Norfolk Southern, 10-K, February 15, 2008 at K16). And in an SEC Form 10-K dated February 28, 2008, Defendant UP disclosed that "the Attorney General of a state outside our service area issued a grand jury subpoena to us requesting documents pertaining to our fuel surcharge program. We met with representatives of this Attorney General's office, and we plan to have additional meetings in the future in an effort to resolve that office's interest in this matter." (Union Pacific Corp., 10-K, February 28, 2008 at 15).

26. As a direct and proximate result of the price fixing conspiracy alleged herein, Defendants have restrained competition in the market for rate-unregulated rail freight transportation services and injured Plaintiffs and each Class member in their business and property. Plaintiffs and the members of the Class each have paid a higher price for unregulated rail freight transportation than they would have paid absent the concerted unlawful activity alleged herein.

27. Plaintiffs seek damages on behalf of themselves and the Class for Rail Fuel Surcharges imposed on rail freight shipments made under private transportation contracts and through other means exempt from rate regulation under federal law. Plaintiffs do not seek, on behalf of themselves or the Class, damages or relief arising from Rail Fuel Surcharges imposed on rate-regulated freight transportation.

PARTIES

Plaintiffs

28. Plaintiff Agway Liquidating Trust ("Agway") was established by order of the United States Bankruptcy Court for the Northern District of New York, dated April 28, 2004 confirming the Debtor's Second Amended Joint Plan of Liquidation, and is authorized to prosecute the claims set forth herein. D. Clark Ogle was appointed the Trustee of the Liquidating Trust by order dated April 28, 2004, and has directed the Liquidating Trust to prosecute these claims through its counsel. Agway was an agricultural cooperative formed in 1964 that is headquartered in DeWitt, New York. On October 12, 2002, Agway and several of its wholly-owned subsidiaries filed for bankruptcy protection pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 1101 et seq. On April 28, 2004, Agway's Plan was confirmed, and liquidation of the estate currently continues under the Trustee. Agway has been in the business of shipping farm products to various customs clearance yards in Chicago, Illinois

and Detroit, Michigan, transferring those products to storage facilities, and re-shipping product from these storage facilities to customers of Agway. Agway purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

29. Plaintiff Fayus Enterprises ("Fayus") is a corporation organized under the laws of the State of California, with its principal place of business at 1720 N. Market Boulevard, Suite 11, Sacramento, CA 95834. During the Class Period, Fayus was a California-based wholesale and retail outlet for African and Caribbean food products servicing a diverse clientele ranging from small independent restaurants, institutional foodservice establishments as well as supermarkets and grocery stores. Fayus purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants.

30. Plaintiff Maroon Incorporated ("Maroon") is an Ohio corporation with its principal office at 1390 Jaycox Road, Avon, Ohio 44011, and a secondary office at 7750 Industrial Drive, Forest Park, Illinois 60130. At all relevant times during the Class Period, Maroon has been in the business of shipping chemical products to various customs clearance yards in Chicago, Illinois and Detroit, Michigan, transferring those products to storage facilities, and re-shipping said products from said storage facilities to customers of Maroon. Maroon also has distribu-

tion facilities located in Minneapolis, Minnesota; Cincinnati, Ohio; Grand Rapids, Michigan; Chicago, Illinois; Cleveland, Ohio; Detroit, Michigan; Louisville, Kentucky; Milwaukee, Wisconsin; and Newark, Delaware. Maroon purchased unregulated rail freight transport services indirectly from one or more of the Defendants during the Class Period, and paid Rail Fuel Surcharges indirectly to Defendants. By reason of the conspiracy alleged herein, and the imposition by Defendants of Rail Fuel Surcharges, Maroon paid prices for rail freight transportation services which were greater than the prices which would have been available in a competitive market without the conspiracy. Maroon has therefore been injured in its business and property by reason of Defendants' violations of the federal and state antitrust laws, state consumer protection and unfair competition laws, and state common law, as more fully set forth herein.

31. Plaintiffs Agway, Fayus and Maroon (collectively, "Plaintiffs") purchased unregulated rail freight transportation indirectly from one or more of the Defendants during the Class Period, and during the Class Period one or more of the Defendants assessed Rail Fuel Surcharges on Plaintiffs in connection with that unregulated rail freight transportation. The prices Plaintiffs paid to Defendants for unregulated rail freight transportation services on which Rail Fuel Surcharges were imposed were greater than the prices Plaintiffs would have paid absent the conspiracy alleged herein. Plaintiffs have therefore been injured in its business

and property by reason of Defendants' antitrust and consumer protection violations. Plaintiffs assert its claims on behalf of themselves and all indirect purchasers of unregulated rail freight transportation services from one or more of the Defendants, and as to which Defendants imposed Rail Fuel Surcharges, during the Class Period.

Defendants

32. Defendant CSX Transportation, Inc. ("CSX") has its principal place of business at 500 Water St., Jacksonville, Florida 32202. CSX is a major freight railroad operating primarily in the eastern United States and Canada. CSX links commercial markets in 23 states, the District of Columbia, and certain Canadian provinces. CSX has railway lines throughout the eastern United States.

33. Defendant Norfolk Southern Railway Company ("NS") has its principal place of business at Three Commercial Place, Norfolk, Virginia 23510. NS is a major freight railroad operating primarily in the eastern United States. NS serves all major eastern ports and connects with rail partners in the West, linking customers to markets around the world.

34. Defendant BNSF Railway Company ("BNSF") has its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF is a wholly owned subsidiary of the Burlington Northern Santa Fe Corporations, the holding company formed by the September 22, *1995* merger of Burlington Northern and Santa Fe Corporation. BNSF

is the second largest railroad network in North America and operates 32,000 route miles of railroad. BNSF has offices and rail lines throughout the western United States, extending into the Southeastern states.

35. Defendant Union Pacific Railroad Company ("UP") has its principal place of business at 1400 Douglas Street, Omaha, Nebraska 68179. UP is the largest freight railroad in the United States. UP serves primarily the western two-thirds of the United States and maintains coordinated schedules with other rail carriers to handle freight to and from other parts of the country (including District of Columbia).

JURISDICTION AND VENUE

36. This Court's jurisdiction is founded on 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1331 and 1337.

37. This Court also has diversity jurisdiction over the claims herein pursuant to 28 U.S.C. §§ 1332(d)(2) and (6) because one or more members of the putative class defined herein are citizens of a State different from one or more defendants and the aggregate amount in controversy exceeds five million dollars ($5,000,000), exclusive of interest and costs. This is a class action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interest and costs.

38. Venue is proper in this district pursuant to Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) and 28 U.S.C. § 1391. Defendants maintain offices, transact business, have agents and

are found within this District; thousands of Class members are located in this District; a substantial part of the events giving rise to the claims occurred in this District; and Defendants regularly conduct business in interstate commerce that is carried out in part in this District.

39. Venue is also proper because this action has been transferred to this District by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407(a). Thus no other forum would be more convenient for the parties and witnesses to litigate this case.

40. This Court has jurisdiction of the person of each Defendant. Each Defendant (a) transacted business within this District; (b) directly or indirectly sold or delivered rail transportation services in this District; (c) has substantial contacts with this District; and (d) engaged in an illegal price-fixing conspiracy that had the intended effect of causing injury to persons and entities found in or doing business in this District.

EFFECTS ON INTERSTATE COMMERCE

41. The AAR Policy and Economics Department reported that railroad total operating revenue in the United States was over $52 billion in 2006.

42. Defendants' activities within the Class Period were within the flow of interstate and international commerce, as they engaged in rail freight shipments to customers and shippers throughout the United States. Each Defendant, as well as their co-conspirators, used instrumentalities

of interstate and/or foreign commerce to sell rail freight transportation services.

43. Defendants accounted for more than 90 percent of all rail freight shipments within the United States during the Class Period. The activities of Defendants and their co-conspirators have had a direct, substantial and foreseeable effect on interstate and international commerce.

44. Defendants' conspiracy further affected commerce in each of the states identified herein because they, directly or through their agents, engaged in activities affecting each state. Defendants have purposely availed themselves of the laws of each of the states identified herein in connection with their activities relating to the provision of rail freight transportation services. Defendants provided rail freight transportation services in each of the states identified herein, thereby purposefully profiting from access to indirect purchasers in each state. Defendants also contracted to supply rail freight transportation services in each such state. As a result of the activities described herein, Defendants:

(a) Caused tortious damage to the residents of the states identified herein;

(b) Caused tortious damage in each of the states identified herein by acts or omissions committed outside each such state by regularly doing or soliciting business in each such state;

(c) Engaged in persistent courses of conduct within each such state and/or

derived substantial revenue from the provision of rail freight transportation services in each such state; and

(d) Committed acts or omissions that they knew or should have known would cause damage (and did, in fact, cause damage) in each such state while regularly doing or soliciting business in each such state, engaging in other persistent courses of conduct in each such state and/or deriving substantial revenue from the marketing and provision of rail freight transportation services (and related services) in each such state.

45. The conspiracy described herein affected adversely every person, including consumers, in each of states identified in this Complaint who indirectly bought Defendants' rail freight transportation services. Defendants' conspiracy has lasted over four years and resulted in a collective adverse monetary effect on indirect purchasers in each state identified herein.

46. Indirect prices of rail freight transportation services in each state can be manipulated by conspirators within that state, outside of it, or both. Without enforcing the antitrust and/or consumer protection laws of each of the states identified herein, firms that break the law will go unpunished. Defendants knew that commerce in each of the

states identified herein would have to be adversely affected in order to implement their conspiracy.

CLASS ACTION ALLEGATIONS

47. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated, under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The "Class" is defined as:

> All indirect purchasers of rail freight transportation services from Defendants, through use of private railroad-shipper contracts or through other means exempt from rate regulation under federal law, as to which Defendants assessed a Rail Fuel Surcharge, from July 1, 2003 to the present (the "Class Period"). Excluded from the Class are Defendants, any subsidiaries or affiliates of Defendants, and any of Defendants' co-conspirators, whether or not named as a Defendant herein and all federal governmental entities.[1]

48. The Class is so numerous, and its members so geographically dispersed, that joinder of all class members would be impracticable. Plaintiffs currently lack precise information as to the size of the Class, but believe that the Class is comprised of thousands of members whose identities can readily

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[1] Plaintiffs reserve the right to amend the class definition to add additional subclasses and additional plaintiffs at the time of the motion for class certification.

be ascertained from the books and records of Defendants.

49. Plaintiffs' claims are typical of those of the Class, all of whose members have been damaged because they paid supra-competitive prices for unregulated rail freight transportation services during the Class Period by reason of Defendants' anticompetitive activities in violation of federal and state law as set forth herein.

50. Plaintiffs will fairly and adequately protect the interest of Class members. Plaintiffs have retained competent counsel with experience in class action and antitrust litigation.

51. Common questions of law and fact exist as to all members of the Class, and these questions predominate over any questions affecting solely individual Class members. Among the common questions are:

- whether Defendants conspired, agreed and/or combined with themselves or others for the purpose of and with the effect of raising, fixing or maintaining the price of Rail Fuel Surcharges applied to unregulated rail freight transportation services purchased by the Class;

- whether Defendants' activities violated the federal and/or state antitrust laws as set forth herein;

- whether Defendants' activities violated state unfair competition and/or consumer protection laws as set forth herein;
- whether Defendants' activities violated state common law as set forth herein;
- whether Defendants' activities caused injury to the business and property of Plaintiffs and the Class; and
- what is the proper measure of any damages to be awarded to Plaintiffs and the Class.

52. A class action is superior to other available methods for the fair and efficient adjudication of this matter. Prosecution of separate actions by individual Class members would unduly burden the courts and risk inconsistent adjudications of common questions of law and fact. A class action would achieve economies of time and expense, uniform results, and procedural fairness to all parties.

53. The amounts at stake for Class members are not great enough to merit individual actions against Defendants, although the aggregate amount is substantial. No Class member thus has a pragmatic interest in individually controlling the prosecution of this case. Plaintiffs foresee no difficulty in the management of this action as a class action.

DEREGULATION OF THE RAILROAD INDUSTRY

54. Congress deregulated the railroad industry with passage of the Staggers Rail Act of 1980 ("Staggers Act"). This landmark legislation marked a dramatic change in the evolution of U.S. railroads. After decades of regulatory control over virtually every aspect of their economic operations, railroads were free to set market rates for rail transportation.

55. Prior to the Staggers Act, railroads for freight transport generally would only charge the published tariff rates filed by the railroads with the ICC. During that era of full regulation, railroads could apply to the ICC for across-the-board rate increases, which could lawfully be implemented on a collective basis.

56. Today, by contrast, 80 percent or more of all rail shipments are exempt from rate regulation or move under private transportation contracts, the rates in which are not regulated. For all of this rate-unregulated traffic, the railroads cannot turn to some agency – like the old ICC – to obtain across-the-board increases in freight rates, nor can the railroads lawfully collude to set those rates.

57. Since 1980, the number of Class I railroads has declined dramatically, from 35 at the time of passage of the Staggers Act to just seven today (two of which are owned by Canadian entities).[2] The

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[2] A Class I railroad is one having revenues in excess of $250 million in 1991 dollars ($319.3 million in 2005 dollars). There

railroad industry is now highly concentrated: four of these railroads – Defendants BNSF, UP, CSX and NS – operate more than 90 percent of all railroad track in the U.S. and in 2006 accounted for approximately $50 billion in total annual revenue. Given the high fixed costs in the railroad industry and its significant barriers to entry (i.e., the need to invest in a vast network of tracks, stations, yards, and switching facilities that take decades to develop, and require onerous regulatory and environmental reviews and approval), there is only a fringe or niche market of smaller carriers, and the competition offered by these small carriers is negligible.

58. Although the reason for deregulation of the railroad industry was to promote competition and lower freight rates, it is now clear that the opposite has come true – railroads are collectively charging shippers supracompetitive rates.

THE DEFENDANTS INTRODUCE FUEL SURCHARGES

59. By the early 2000s, the industry had consolidated to the point where further mergers were unlikely if not impossible. In response to the proposed Burlington Northern Santa Fe and Canadian National Railway Co. merger, the STB, which

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are currently seven Class I railroads operating in the United States: (1) BNSF; (2) UP; (3) CSX; (4) NS, (5) KCS; (6) Soo Line Railroad Co.; and (7) Grand Trunk Corporation. The Soo Line Railroad is owned by Canadian Pacific Railway. The Grand Trunk Corporation is owned by the Canadian National Railway

succeeded the ICC, introduced a moratorium on new mergers and then promulgated more stringent standards for merger review. At the same time, railroads were experiencing surging freight demand and tight capacity.

60. In this environment, Defendants lacked the legal means to implement a traditional across-the-board price increase. As a result of deregulation, Defendants could no longer ask the ICC or its successor, the STB, for across-the-board rate increases. Thus, the only practicable way to increase prices across-the-board and increase revenues in the short term is through the mechanism of a uniform surcharge to as many customers as possible. Under the guise of rising fuel prices, Defendants colluded to create and implement the Rail Fuel Surcharges as a means to implement what effectively operate as across-the-board rate increases.

61. Since passage of the Staggers Act in 1980, railroads had increasingly entered into private transportation contracts with cost escalation provisions often tied to the AII and the RCAF (which is based on the AII). Both the RCAF and the AII were published by the AAR, and both Indexes included fuel costs as a factor. The AII and RCAF weighted a number of cost factors – labor, fuel, materials & supplies, equipment rents, depreciation, interest, and other expenses – so that the actual impact of particular cost increases (e.g., for fuel) would be reflected in the index. Any actual increase in fuel costs, no matter how large, would be captured in the

AII and RCAF. The Indexes, and the weighted factors within them, were designed for this purpose.

62. Defendants, in 2003, seized upon fuel as the means to create the type of across the board rate increase for which these railroads, in the era of deregulation, could no longer apply to a regulatory body. As alleged above, the Defendants embarked upon and implemented an agreed plan to remove fuel from the AII (and thus from the RCAF based on the AII), and thereby permit separate "fuel surcharges" to be widely applied. With fuel no longer weighted against other cost factors, the separate "fuel surcharges" could be used simply to raise total freight prices by a given percentage – and that is precisely what these four railroads proceeded to do.

63. By way of background, prior to 2003, at least some of the Defendants imposed so-called "fuel surcharges" on private rail freight transportation, but (a) these fuel surcharges were applied only in isolated instances, and (b) each of the Defendants had different fuel surcharge rates, reflecting, *inter alia*, the differing fuel costs of each railroad. At that time, such surcharges were the exception, with the AII and RCAF indexes widely used to capture fuel costs and other costs. All of that changed in 2003, however, when the Defendants took a series of coordinated actions to switch to a new system that would allow the widespread use of Rail Fuel Surcharges as a revenue enhancement mechanism.

64. From at least the Spring of 2003 and continuing through the present, the top executives of

each of the Defendants met regularly to discuss their industry. For example, at biannual meetings of the National Freight Transportation Association ("NFTA"), executives of the Defendants met to consider and discuss developments in the railroad industry. Defendants' top executives also met and discussed their industry when they came to Washington, DC for AAR board meetings. The Spring 2003 meeting of the NFTA occurred from April 2nd to April 6th, at the Wigwam resort, in Litchfield Park, Arizona.

65. Within just months of the Spring 2003 NFTA meeting, and as early as July 2003, the two Western Railroads, BNSF and UP, suddenly began to coordinate their Rail Fuel Surcharges. Prior to this time, the UP fuel surcharge had been adjusted monthly based on the WTI Index. The BNSF fuel surcharge had been based on the HDF Index. In or about July 2003, however, UP switched to the HDF Index pursuant to an agreement with the BNSF. From that point on, the Western Railroads moved in lockstep and charged the exact same Rail Fuel Surcharge percentage for each month of the class period.

66. BNSF and UP agreed to administer the HDF Index in precisely the same way. Whenever the U.S. average price of diesel fuel as measured by the HDF Index equaled or was lower than $1.35 per gallon, no surcharge was applied. When the HDF Index exceeded $1.35 per gallon, however, BNSF and UP both applied a surcharge of 0.5 percent for every five cent increase above $1.35 per gallon. So, for

example, if the HDF Index rose to $1.55 per gallon, BNSF and UP would apply a surcharge of 2 percent. The surcharge would increase 2 percent for every 20 cents increase in the HDF Index.

67. The Western Railroads also coordinated when they would change their fuel surcharge. They agreed that the Rail Fuel Surcharge would be applied to shipments beginning the second month after the month in which there was a change in the HDF Index average price calculation. So, for example, if the HDF Index average price changed in January, the Western Railroads would announce their new Rail Fuel Surcharge percentage on February 1 (always on the first day of the month), and then apply the surcharge to shipments in March. The Western Railroads published their monthly fuel surcharge percentages on their websites, making any deviation from cartel pricing easily detectable.

68. The Western Railroads' coordination is reflected in their simultaneous selection and adoption of the same novel, arbitrary and complex combination of features for their Rail Fuel Surcharge programs, including use of the HDF Index for fuel surcharges, setting the trigger point at $1.35 per gallon, and applying the surcharge in the second calendar month after the HDF Index average price had changed. The similarities are both too precise and too comprehensive to have been independent responses to any common market phenomenon that the Defendants were facing.

69. UP's move to the same fuel price index used by BNSF in July of 2003 is striking evidence of concerted conduct in light of the fact that just two months before, UP had announced a different modification to its existing fuel surcharge program. In April of 2003, UP made modifications to the trigger points it used for adjusting surcharges in its program, but did not change the index it employed. The fact that, just two months later, UP switched indices and began charging exactly the same surcharges as BNSF is further evidence that this switch was the result of concerted conduct.

70. Even having coordinated their fuel surcharges, however, BNSF and UP still faced the significant barrier to widespread use of fuel surcharges: specifically, the widely used private contracts had cost escalation provisions that already accounted for fuel. BNSF, UP, CSX and NS agreed to solve this problem by conspiring to remove fuel from the widely used cost escalation indexes, thereby paving the way for widespread imposition of the new fuel surcharge program in which all four of the Defendants could participate, and from which all four could earn excessive profits.

71. In the fall of 2003, BNSF and UP initiated an effort in the AAR to get all Defendants to agree on a fuel surcharge program that would enable the Defendants to take fuel costs out of the weighted RCAF and AII (which already permitted the Defendants to recover all of their fuel costs), and instead apply artificially high Rail Fuel Surcharges as a revenue enhancement mechanism: that is, use the

"surcharge" to charge a percentage increase on the total cost of the freight transport, regardless of the actual cost of fuel for that transport job. Through meetings and discussions within the AAR board on October 2-3, December 11-12 and otherwise in 2003, Defendants BNSF, UP, CSX and NS agreed to create and implement coordinated fuel surcharge programs, and to enforce their program through a variety of means discussed herein.

72. Pursuant to the agreements among Defendants BNSF, UP, CSX and NS, the Defendants, which dominate the AAR board, caused the AAR to announce in December 2003 the creation of an unprecedented, new All Inclusive Index Less Fuel (the AII-LF) – that is, a cost escalation index without fuel as a component. This new index was similar to the AII and the RCAF, except that this new index excluded fuel as a component. The AAR announcement in December 2003 stated: "This issue of AAR Railroad Cost Indexes inaugurates a new index: the All-Inclusive Index Less Fuel. This index is calculated using the same components and methods as the All-Inclusive Index uses for the Rail Cost Adjustment Factor, with the exception of the exclusion of the fuel component." This announcement, and the underlying decision to create the new index, were the collective action of the Defendants, and could not have been accomplished without the conspiracy. The new AII-LF specified the fourth quarter of 2002 as its base period.

73. Defendants BNSF, UP, CSX and NS conspired to cause the AAR to inaugurate the AII-LF so

that they could begin assessing separate, stand-alone Rail Fuel Surcharges, applied against the total cost of rail freight transportation, and coordinate that practice. The creation of this new index was an important, carefully-planned step taken collectively by the Defendants to allow implementation and continuation of their price fixing conspiracy – a conspiracy that would enable the Defendants to widely impose price increases on the entire cost of rail freight transport and thereby obtain additional revenues far beyond any actual increases in fuel costs. This step itself was a notable departure from past practice, and marked the first time that the AAR created a cost escalation index without a fuel cost component.

74. Defendant BNSF has admitted that it worked through the AAR to accomplish this revenue-generating measure in 2003. When asked how BNSF would be able to apply the new revenue-based fuel surcharges into contracts with coal shippers, John Lanigan ("Lanigan"), BNSF's Chief Marketing Officer, responded that BNSF would be able to do so because of the changes made to the RCAF through the AAR (that is, the new AII-LF). Referring to Matthew K. Rose, BNSF's Chairman, President, and CEO, Lanigan stated: "What happened last year, *and Matt led the charge on there*, is that there's a new index that [the AAR] has that's basically an index without fuel. ... So we'll do RCAF less fuel plus a direct fuel surcharge in the future." (emphasis added).

75. Almost immediately after the announcement in December 2003 of the new AII-LF (the cost escalation index without fuel), and pursuant to the conspiracy, the two Eastern Railroads, Defendants CSX and NS, suddenly moved into lockstep with fuel surcharges based on the WTI Index. This move into lockstep was part and parcel of, and flowed from, the aforementioned agreements implemented and executed by BNSF, UP, CSX and NS in late 2003.

76. Specifically, the Eastern Railroads agreed to apply a fuel surcharge whenever the monthly average WTI price exceeded $23 per barrel. When that happened, the Eastern Railroads' rates were increased 0.4 percent for every $1 that the price of WTI oil exceeded $23 per barrel. So, for example, if the price of WTI oil was $28 per barrel, the fuel surcharge percentage would be 2 percent. The Rail Fuel Surcharge would be adjusted upward at 2 percent for every $5 increase in the WTI average price.

77. The Eastern Railroads also coordinated when they would change their fuel surcharge – two calendar months after the WTI Index had adjusted, thereby adopting the same fuel surcharge price timing used by the Western Railroads. For example, if the WTI average price exceeded $23 per barrel in January, the Eastern Railroads would assess the applicable fuel surcharge percentage to all bills of lading dated in the month of March. In this way, Defendants could apply exactly the same fuel surcharge percentage month after month. The Eastern Railroads published their monthly fuel surcharge

percentages on their websites, making any deviation from cartel pricing easily detectable.

78. The Eastern Railroads' coordination is reflected in their simultaneous selection and adoption of the same novel, arbitrary and complex combination of features for their Rail Fuel Surcharge programs: including using the WTI Index for fuel surcharges, setting the trigger point at $23 per barrel, and applying the surcharge in the second calendar month after the average price of WTI oil had changed. The similarities, and the coordination with the Western Railroads, are too precise and too comprehensive to have been independent responses to any common market phenomenon that the Defendants were facing.

79. Thus, following the conspiratorial publication of the AII-LF, Defendants BNSF, UP, CSX and NS seized the opportunity and began to apply Rail Fuel Surcharges as a separate item on shippers' bills. The Defendants used monthly changes to their Rail Fuel Surcharges as an easy way to increase revenues in an across the board manner.

80. There was no legitimate business justification or natural explanation for the collective action of BNSF, UP, CSX and NS to cause the AAR to adopt and publish the AII-LF. Such a "revenue-based" fuel surcharge bore no direct relationship to Defendants' actual increase in fuel costs. The fuel surcharge program was not a cost recovery mechanism, but a revenue enhancement measure that could only have been accomplished by the Defend-

ants' conspiratorial action of getting fuel removed from the widely used cost escalation indexes. The AII and RCAF both included a fuel cost component, and the Defendants had used these indices for decades to measure fuel-cost increases. As an empirical matter, the fuel component of the AII and RCAF would have permitted the Defendants to recover all of their increased fuel costs throughout the conspiracy period. Thus, the motivation of BNSF, UP, CSX and NS in collectively causing the adoption of the AII-LF could not have been greater fuel cost recovery or more efficient fuel cost recovery.

81. The actions by Defendants thus were not independent responses to a common problem of increasing fuel costs. Rather, the only purpose in taking these collective actions was to begin assessing a stand-alone fuel surcharge applied to *revenue* (*i.e.*, the entire base rate for the freight shipment), not costs; to act in concert with one another in setting fuel surcharge prices and demanding them from shippers and customers; and to ensure collective enforcement of the program. That is, pursuant to their conspiracy, Defendants would now be able to apply the supposed fuel cost increase percentage to the *entire cost of the freight* shipment (notwithstanding that fuel only accounts for a portion of the costs of the shipment). Through this collective action, Defendants BNSF, UP, CSX and NS planned to use the stand-alone fuel surcharge as an easy way to dramatically increase profits without having to wait for new rail capacity to come on line to meet growing demand – so long as these railroads partici-

pated by not competing on fuel surcharge prices to undercut one another.

82. The creation and publication of a cost escalation index without a fuel component was not required by any regulatory body, nor was it necessary for any Defendant to institute independently its own individual fuel surcharge program. Instead, the creation of the Rail Fuel Surcharge program starting in 2003 was the joint action by BNSF, UP, CSX and NS to achieve their collective goal of generating additional profits through implementing revenue-based fuel surcharges.

83. As a result of the concerted action among BNSF, UP, CSX and NS, prices of Rail Fuel Surcharges charged to rail shippers and customers (members of the Class) were raised to or maintained at supra-competitive levels during the Class Period.

IMPLEMENTATION OF THE SCHEME: THE FUEL SURCHARGES IMPOSED BY THE DEFENDANTS

84. As detailed above, Defendants BNSF, UP, CSX and NS agreed in 2003 to remove fuel from the AII and RCAF, and thereby permit the application of separate Rail Fuel Surcharges as a multiplier percentage of the base rate charged for the rail freight transportation involved. This meant that the Fuel Surcharge could operate as a means to impose an effective across-the-board rate increase, and thereby raise revenue far beyond the actual costs of fuel (which could have continued to be recovered through the AII and RCAF). Defendants applied these sur-

charges not only to published tariff rates, but to the private contracts, and other traffic, not subject to rate regulation under federal law (*i.e.*, the unregulated rates at issue here).

85. With the conspiracy underway, the two Western Railroads, using the HDF index, moved in lockstep and charged virtually identical Rail Fuel Surcharges on a monthly basis throughout the Class Period.

86. The chart below shows that the Fuel Surcharge percentages charged by the Western Railroads for freight shipments varied before the Class Period began, but were identical starting in July 2003:

MONTHLY SURCHARGE PERCENTAGES -- WESTERN RAILROADS

MONTH	BNSF	UP
Jun-02	1.0%	0
Jul-02	1.0%	0
Aug-02	0	0
Sep-02	0	0
Oct-02	1.0%	0
Nov-02	2.0%	0
Dec-02	2.5%	0
Jan-03	2.0%	2.0%
Feb-03	2.0%	2.0%
Mar-03	2.5%	2.0%
Apr-03	4.5%	2.0%
May-03	2.0%	2.0%
Jun-03	3.0%	2.0%

MONTH	BNSF	UP
Jul-03	**2.5%**	**2.5%**
Aug-03	2.0%	2.0%
Sep-03	2.0%	2.0%
Oct-03	2.5%	2.5%
Nov-03	2.5%	2.5%
Dec-03	2.5%	2.5%
Jan-04	2.5%	2.5%
Feb-04	2.5%	2.5%
Mar-04	3.5%	3.5%
Apr-04	3.5%	3.5%
May-04	4.0%	4.0%
Jun-04	4.5%	4.5%
Jul-04	5.0%	5.0%
Aug-04	5.0%	5.0%
Sep-04	5.0%	5.0%
Oct-04	6.0%	6.0%
Nov-04	7.0%	7.0%
Dec-04	9.0%	9.0%
Jan-05	9.0%	9.0%
Feb-05	8.0%	8.0%
Mar-05	7.5%	7.5%
Apr-05	8.0%	8.0%
May-05	10.0%	10.0%
Jun-05	10.5%	10.5%
Jul-05	9.5%	9.5%
Aug-05	10.5%	10.5%
Sep-05	11.5%	11.5%
Oct-05	13.0%	13.0%
Nov-05	16.0%	16.0%
Dec-05	18.5%	18.5%

MONTH	BNSF	UP
Jan-06	13.5%	13.5%
Feb-06	12.0%	12.0%
Mar-06	12.5%	12.5%
Apr-06	12.5%	12.5%
May-06	13.5%	13.5%
Jun-06	15.0%	15.0%
Jul-06	16.5%	16.5%
Aug-06	16.5%	16.5%
Sep-06	17.0%	17.0%
Oct-06	18.0%	18.0%
Nov-06	15.5%	15.5%
Dec-06	13.0%	13.0%
Jan-07	13.0%	13.0%
Feb-07	14.0%	14.0%
Mar-07	12.5%	12.5%
Apr-07	12.5%	12.5%
May-07	14.5%	14.5%
Jun-07	16.0%	16.0%
Jul-07	15.5%	15.5%
Aug-07	16.0%	16.0%
Sep-07	16.5%	16.5%
Oct-07	16.5%	16.5%
Nov-07	17.5%	17.5%
Dec-07	18.5%	18.5%
Jan-08	21.5%	21.5%
Feb-08	21.0%	21.0%
Mar-08	21.0%	21.0%
Apr-08	21.5%	21.5%
May-08	26.5%	26.5%

87. As detailed above, there also was uniformity among the Eastern Railroads in the monthly surcharge percentages, based on the WTI Index, that they charged customers for most of the Class Period.

88. The chart below shows that the Fuel Surcharge Percentages charged by Defendants CSX and NS for carload shipments varied before the Class Period, but were identical starting in March 2004:

MONTHLY SURCHARGE PERCENTAGES -- EASTERN RAILROADS

MONTH	CSX	NS
Jun-03	2.4%	2.0%
Jul-03	2.4%	2.0%
Aug-03	3.2%	2.0%
Sep-03	3.2%	2.0%
Oct-03	3.6%	2.0%
Nov-03	2.4%	2.0%
Dec-03	3.2%	2.0%
Jan-04	3.6%	2.0%
Feb-04	4.0%	2.0%
Mar-04	**4.8%**	**4.8%**
Apr-04	4.8%	4.8%
May-04	5.6%	5.6%
Jun-04	5.6%	5.6%
Jul-04	7.2%	7.2%
Aug-04	6.4%	6.4%
Sep-04	7.2%	7.2%
Oct-04	8.8%	8.8%
Nov-04	9.2%	9.2%
Dec-04	12.4%	12.4%
Jan-05	10.4%	10.4%

MONTH	CSX	NS
Feb-05	8.4%	8.4%
Mar-05	9.6%	9.6%
Apr-05	10.0%	10.0%
May-05	12.8%	12.8%
Jun-05	12.4%	12.4%
Jul-05	10.8%	10.8%
Aug-05	13.6%	13.6%
Sep-05	14.4%	14.4%
Oct-05	16.8%	16.8%
Nov-05	17.2%	17.2%
Dec-05	16.0%	16.0%
Jan-06	14.4%	14.4%
Feb-06	14.8%	14.8%
Mar-06	17.2%	17.2%
Apr-06	15.6%	15.6%
May-06	16.0%	16.0%
Jun-06	18.8%	18.8%
Jul-06	19.2%	19.2%
Aug-06	19.2%	19.2%
Sep-06	20.8%	20.8%
Oct-06	20.4%	20.4%
Nov-06	16.4%	16.4%
Dec-06	14.4%	14.4%
Jan-07	14.8%	14.8%
Feb-07	16.0%	16.0%
Mar-07	12.8%	12.8%
Apr-07	14.8%	14.8%
May-07	15.2%	15.2%
Jun-07	16.4%	16.4%

89. In stark contrast to this uniformity in fuel surcharge percentages, fuel cost as a percentage of operating cost and fuel efficiency differs widely among the Defendant railroads. Absent collusion, it is extremely unlikely that Defendants, in both the east and the west, would independently price their Rail Fuel Surcharges to arrive at the identical percentage month after month, year after year, for a period of more than three years. The fact that Defendants moved in uniform lockstep for a period of nearly 38 months indicates that Defendants were coordinating their behavior and conspired to fix prices for Rail Fuel Surcharges. In addition, the advance announcements of each Defendant's Fuel Surcharges was an important implementation and enforcement mechanism for the conspiracy.

90. Railroad industry analysts took note of the curious "convergence" in Rail Fuel Surcharge methodologies adopted by the Defendants. For example, after concluding in 2003 that the Rail Fuel Surcharges charged by the Defendants were "not supported" by fuel cost increases, one analyst stated that she was "puzzled by the fact that the railroads appear to be matching fuel surcharges rather than developing their own pricing initiatives." The analyst noted further that "the way to gain significant market share is to lead the competition rather than following the competition." ("Following the Competition," *Traffic World*, July 14, 2003).

91. Defendants' use of retail price indices in furtherance of the conspiracy also allowed them to over-recover their actual fuel costs. According to an

economic analysis on Railroad Fuel Surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter of 2007.

92. BNSF's average cost for diesel fuel in Third Quarter ("3Q") 2003 was $0.846 per gallon and its average cost of diesel fuel for 3Q 2004 was $0.988 per gallon. Thus, BNSF's cost of fuel increased 14.4% from 3Q 2003 to 2004. In contrast, the surcharge charged by BNSF based on the HDF 3Q 2003 price was $1.46 per gallon and $1.83 per gallon in 3Q 2004, amounting to a 25.3% increase. As a result of this disparity in increase percentages, shippers purchasing from BNSF paid 11% more than the actual price BNSF paid for fuel from 3Q 2003 to 2004. Shippers of unregulated freight from the other Railroad Defendants similarly over-paid during this and other periods particularly since the inflated percentage increase was applied to the entire rate at issue not merely to the fuel cost component of that rate. Another reason why Defendants' Rail Fuel Surcharges were not a natural reaction to increased fuel costs is that the surcharge levels disregarded gains in fuel efficiency. As explained in a 2007 AAR publication, the Defendants' fuel efficiency is "constantly improving." BNSF, for example, disclosed in 2005 that it had achieved a 9% improvement in fuel efficiency over the prior ten years. In 2006, the railroads could, on average, move one ton of freight 423 miles on one gallon of diesel fuel. By calculating fuel surcharges as a percentage of the shipping rate,

the Defendants deflected attention from the cost savings they achieved through fuel efficiency gains.

93. There is no independent business justification to explain Defendants' behavior. Their uniform pricing of fuel surcharges for more than a three-year period could not have happened by chance or coincidence. Nor was it an expected response to a common business problem. Any actual increased fuel costs experienced by the Defendants would have been covered by the AII and RCAF. The uniform pricing could only have been achieved by an express agreement followed by collective action – first, to decouple fuel prices from the historical railroad cost indices and, second, to agree upon new and complex indices and trigger points for computing the stand-alone fuel surcharge percentages. The Defendants' purpose was to use generally increasing fuel costs as a cover for implementing what were, in effect, across-the-board rate increases.

94. In agreeing to collude on fuel surcharges, each Defendant was acting against its independent short-term, economic self-interest. In a competitive environment, free of collusion, carriers with lower fuel costs could impose a lower surcharge and thereby increase market share at the expense of competing railroads. Rather than engage in such competitive behavior, Defendants instead restricted their freedom to price competitively and adhered to an industry-wide pattern of uniform fuel surcharge pricing based on the total cost of the freight.

OTHER ELEMENTS OF THE CONSPIRACY

95. At or about the time the Defendants agreed to fix the Rail Fuel Surcharge prices, the Defendants also took other steps in furtherance of the conspiracy. They largely switched from offering long-term contracts (the terms of which were secret) to offering contracts that were "re-priced" as often as monthly. Previously, Defendants had allowed, and often preferred, long-term contracts ranging up to five years with clauses that did not permit rate increases beyond a certain point, usually governed by the AII or the RCAF, or that excluded fuel surcharges altogether.

96. This collective movement away from long-term contracts meant that Defendants no longer offered discounts to increase market share and their pricing became more visible to each other.

97. Defendants made this switch even though most shippers preferred the former system in order to minimize risk and make costs more predictable. In a competitive environment, forcing customers to assume greater risks without any offsetting benefit (such as lower prices) would cause customers to seek alternatives, which should promote competition between carriers for their business. Here, all Defendants raised prices and did not offer any compensation to customers for assuming additional risk. Similarly, in a competitive market, one would expect that the railroads would seek, as they had in the past, to reduce their own risks and lock-in market share by entering into long-term contracts. The

Defendants, however, collectively refused to offer long-term contracts and took no steps to minimize their own risks from fluctuations in demand. This coordinated behavior was hardly routine market conduct.

98 In furtherance of the conspiracy, Defendants also declined to negotiate discounts on the Fuel Surcharges and overall contract rates, even though prior to mid-2003 it had been customary for the Defendants at least to entertain such negotiations. Shippers from many different industries, some with significant economic power, tried to negotiate the fuel surcharge percentages, but were told by the Defendants (who had previously been willing to negotiate discounts on rail freight rates) that the Rail Fuel Surcharges were "not negotiable." By way of example, during the relevant period the Archer-Daniels-Midland Company ("ADM") approached individual Defendants to discuss hedging opportunities to allow ADM and the railroads certainty and a method for cost-containment. The railroads, acting against their own best individual interests, refused to enter into hedging contracts with ADM.

99 In addition, several national shipper organizations met with each of the Defendants to encourage them to reexamine the methods used to assess Rail Fuel Surcharges. Among the Defendants, only BNSF agreed to make responsive changes to its surcharge program, and that was only for grain and coal shipments coming from certain regions where the BNSF is the only carrier. That is,

BNSF reduced fuel surcharges on traffic where it faced no competition from the UP, and thus would not violate the agreement to fix competitive prices. The other Defendants refused to address the concerns of their customers.

100. In furtherance of the conspiracy, Defendants also decreased the use of "through rates," in which a customer would receive a single bill from either the originating railroad or the termination railroad on a long-distance trip involving more than one railroad (so that a single fee would be allocated among the railroads that shipped). Instead, where a shipment requires movement on more than one railroad, the Defendants moved increasingly to having rates billed separately for each railroad, rather than as one quote for the entire shipment. Defendants made this change, which could only result from their collective action, as part of their conspiracy for two reasons: to provide transparency as to what each railroad was charging on multiple line shipments and to allow each Defendant to bill separately for its applicable fuel surcharge.

101. Defendants also agreed that none of the conspirators would be undercutting agreed pricing or "stealing" market share by using their increasing revenues to subsidize discounting of underlying rates. In fact, as can be seen from the table that follows, Defendants' market shares became more stable following the 2003 agreements than they had historically been.

Railroad Market Share: Originated Tons and Carloads 1998 - 2006[1]

	1998	1999	2000	2001	2002	2003	2004	2005	2006
BNSF									
Carloads Originated	6,739,202	6,876,523	6,909,907	6,928,188	6,999,061	7,662,699	8,237,466	8,727,121	9,335,024
Percent of Total Originated Carloads	31.9%	28.4%	26.5%	27.0%	26.9%	28.4%	29.2%	30.2%	31.2%
Tons Originated	429,408,242	440,180,814	434,255,161	442,932,381	438,123,355	460,789,676	483,296,128	498,121,970	539,511,527
Percent of Total Originated Tons	31.1%	28.5%	26.8%	27.2%	26.9%	27.8%	28.3%	28.7%	30.1%
CSXT[2]									
Carloads Originated	4,184,418	5,842,422	6,542,784	6,321,945	6,335,611	6,470,386	6,611,766	6,537,293	6,607,931
Percent of Total Originated Carloads	19.8%	24.1%	25.1%	24.6%	24.4%	24.0%	23.4%	22.6%	22.1%
Tons Originated	306,034,673	378,007,852	406,314,179	399,970,764	392,903,118	391,993,962	403,152,732	409,486,655	414,266,429
Percent of Total Originated Tons	22.1%	24.5%	25.1%	24.5%	24.1%	23.7%	23.6%	23.6%	23.1%
NS[3]									
Carloads Originated	3,621,159	4,351,478	5,214,436	5,025,864	5,098,926	5,115,859	5,524,545	5,800,390	5,824,813
Percent of Total Originated Carloads	17.1%	18.0%	20.0%	19.6%	19.6%	19.0%	19.6%	20.0%	19.5%
Tons Originated	233,133,810	270,383,729	320,700,204	310,449,934	307,770,416	306,322,113	319,014,426	325,779,848	323,407,280
Percent of Total Originated Tons	16.9%	17.5%	19.8%	19.0%	18.9%	18.5%	18.7%	18.8%	18.1%
UP									
Carloads Originated	6,570,086	7,137,090	7,364,503	7,393,306	7,580,376	7,692,160	7,831,823	7,874,879	8,132,004
Percent of Total Originated Carloads	31.1%	29.5%	28.3%	28.8%	29.1%	28.6%	27.8%	27.2%	27.2%
Tons Originated	413,615,706	453,417,016	459,428,341	476,759,328	489,305,241	497,373,006	503,052,146	503,056,340	514,357,111
Percent of Total Originated Tons	29.9%	29.4%	28.3%	29.2%	30.1%	30.0%	29.4%	29.0%	28.7%
Total									
Carloads Originated	21,114,865	24,207,513	26,051,630	25,669,303	26,013,974	26,941,104	28,205,600	28,939,683	29,899,772
Tons Originated	1,382,192,43	1,541,989,41	1,620,697,885	1,630,112,407	1,628,102,129	1,656,478,757	1,708,515,432	1,736,444,813	1,791,542,347

1 AAR Railroad Facts and Analysis of Class I Railroads
2 Data for 1998 and 1999 does not include all of the acquisition Conrail traffic

ADDITIONAL EVIDENCE OF ANTICOMPETITIVE CONDUCT

102. Apart from this direct evidence of price fixing, there is further support that Defendants agreed to fix prices for Rail Fuel Surcharges The rail transportation industry is marked by certain structural and other characteristics that make a price fixing conspiracy feasible:

(a) Defendants had a strong collective motive to enter into a price fixing conspiracy because conditions existed in the railroad industry that were conducive to collusion.

(b) The railroad industry is highly concentrated. Defendants are the only five remaining domestic Class 1 railroads following decades of mergers and consolidation. Defendants account for well over 90 percent of the nation's rail traffic, and there is no fringe or niche market of smaller carriers. There are also high fixed costs in the industry. Such high concentration and fixed costs facilitate a price fixing cartel.

(c) There are significant barriers to entry into the railroad industry. To compete, railroads must invest in a vast network of tracks, stations, yards, and switching facilities. These take decades to develop, and require onerous regulatory and environmental reviews and approval.

Land or easements are often needed, necessitating the involvement of multiple local governments and the exercise of eminent domain power. Because rail infrastructure is of minimal value for other purposes, and rail networks are difficult to assemble, the fixed costs are largely sunk, creating significant entry barriers. Entry also requires that a new entrant capture a significant market share from existing carriers. Entry is thus both expensive and risky.

(d) Rail Fuel Surcharges, when computed as a percentage of revenue, are highly standardized and fungible. Defendants structured their Rail Fuel Surcharges as a percentage of base rates and then published the percentages on their websites so the colluding railroads could monitor the conspiracy without the necessity of frequent communications. It is well recognized that markets having uniform and homogeneous products or services, such as rail freight transportation services, are susceptible to price fixing.

(e) The railroad industry has a long record of price fixing and other anti-competitive behavior. In the first antitrust case dealing with the railroad industry, *United States v. Trans-Missouri Freight*

Ass'n, 166 U.S. 290 (1897), the railroad cartel argued that it must fix prices or the industry would go bankrupt. Prior to deregulation, railroads engaged in open price fixing through establishment of "rate bureaus" and "rate making committees." The Rail Fuel Surcharge program engaged in by the Defendants is strikingly similar to those collective rate-making practices of the past.

(f) The CEOs of Defendants are all board members of the AAR, which facilitated exchange of pricing information. The AAR describes itself as "the central coordinating and research agency of the North American rail industry." Full membership, however, is available only to the seven Class I railroads operating in the United States, the five most significant of which are Defendants here (the other two Class I railroads are owned by Canadian companies). The AAR Board meets regularly and board members (and their staff) regularly communicate between meetings.

THE STB DECISION

103. On January 25, 2007, the STB, which regulates certain aspects of the railroad industry, issued an administrative decision concluding that the railroads' practice of computing Rail Fuel Surcharges as a percentage of base rate for rate-regulated rail

freight transport was an "*misleading and ultimately unreasonable practice*," because the fuel surcharges are not tied to the fuel consumption associated with the individual movements to which they are applied. *Rail Fuel Surcharges*, STB Ex Parte No. 661 (Jan. 25, 2007) (emphasis supplied).

104. The STB further stated that "the term 'fuel surcharge' most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is *mislabeled*." *Id.* (emphasis supplied).

105. The STB's decision addressed rate-regulated rail freight traffic only (which is not the subject of this Complaint). The STB expressly stated that its jurisdiction did not reach rail freight traffic under private contract or otherwise exempted from rate regulation.

106. Pursuant to their conspiracy, Defendants applied the same unreasonable fuel surcharge practices addressed by the STB to the private rail freight transportation contracts, and other unregulated freight transport, at issue in this case.

DEFENDANTS' SUPRACOMPETITIVE PROFITS

107. According to an economic analysis on railroad fuel surcharge practices commissioned by the American Chemistry Council released in September 2007, Defendants overcharged rail shippers by more than $6.5 Billion between 2005 and the first quarter

of 2007. The study's findings were based upon regulatory findings and other estimates from Defendants.

108. According to the article "Rail Fuel Surcharges – Fact Versus Fiction" in the trade press report *Rail Business* by Argus Media Inc. (Volume 14, 15) dated April 14, 2008, "[t]*he change in railroads overall operating expenses (including fuel) do not justify the large fuel surcharges railroads are applying to their movements.*" The article names several factors that have led to the circumstances in which railroads' fuel surcharges are greater than the change in total operating expense.

(a) Companies have established escalation methods, including fuel surcharges, to assure that they do not under-recover their costs of fuel as the price of oil has increased substantially. "[A] company will therefore frequently establish a margin of error in an escalation method that will ensure it is fully protected from cost increases. However, what is a small dollar margin of error...becomes a very large dollar margin of error as oil prices increase..."

(b) "[A]s railroads implemented practices to better manage their cost of fuel internally, they did not reflect these fuel cost improvements in their external fuel surcharge programs." In fact, "[N]one of the four major US railroads revised

their surcharge programs to account for the actions management took to control the cost of fuel. CN was the only railroad that continued to revise its fuel surcharge program and each time the program changed CN lowered its fuel surcharge to more closely reflect the change in its cost of fuel."

(c) "[T]he STB did not hold a hearing on fuel surcharges until May 2006. This was more than four years after the railroads initiated their fuel surcharge programs." However, "[T]he time to make sure a program like fuel surcharges is working properly is before the dollars generated by the program had a big impact on the railroads' financial statements."

(d) Finally, "[W]hen the STB issued the results of its findings from the fuel surcharge hearing it did not require railroads to provide any retroactive reporting on fuel expenses and fuel surcharge revenue."

109. Because fuel surcharges are generally designed to compensate for increases in fuel costs, they should bear a relatively constant relationship to the actual cost of fuel associated with the individual movements to which they are applied. But Defendants have used the Rail Fuel Surcharge not as a cost recovery mechanism, but as a revenue en-

hancement measure. By computing the Rail Fuel Surcharge as a percentage of the base rate charged the shipper, Defendants ensured that there would be no real correlation between the rate increase and the increase in fuel costs for the particular shipment to which the surcharge is applied.

110. Defendants reaped huge, supracompetitive profits as a result of the success of their conspiracy. Through their agreement to coordinate on Rail Fuel Surcharges, Defendants realized billions of dollars in revenues during the Class Period in excess of their actual increase in fuel costs from the specific customers on whom they imposed the surcharge. During the period of the conspiracy (July 2003 to the present), Defendants increased their market capitalization from approximately $40 billion to approximately $105 billion, or an increase of about 160 percent. The AAR Policy and Economics Department reported that railroad total operating revenue in the United States increased from $36.6 billion in 2003 to over $52 billion in 2006. These dramatic increases are at least in part attributable to fuel surcharge revenue realized by Defendants through their price fixing conspiracy. As the head of UP, Young, admitted in 2007, "three, four years ago [the Rail Fuel Surcharges] were really non-existent," and "it's only been the last couple of years that . . . the financial returns in this business has [sic] started to move in the right direction."

111. The unlawful conduct, combination or conspiracy alleged herein had and is having the following effects, among others:

(a) The Rail Fuel Surcharges charged to Plaintiffs and the Class for unregulated rail freight transportation have been fixed or stabilized at supra-competitive levels;

(b) Plaintiffs and the Class have been deprived of the benefits of free, open and unrestricted competition in the market for unregulated rail freight transportation; and

(c) competition in establishing the prices paid in the United States for unregulated rail freight transportation has been unlawfully restrained, suppressed and eliminated.

ANTITRUST INJURY TO INDIRECT PURCHASER PLAINTIFFS AND CLASS

112 The unlawful conduct, combination or conspiracy alleged herein had and is having the following effects, among others:

(a) The Rail Fuel Surcharges charged to Plaintiffs and the Class for unregulated rail freight transportation have been fixed, raised, maintained and/or stabilized at artificially high and supra-competitive levels;

(b) Plaintiffs and the Class have been deprived of the benefits of free, open and unrestricted competition in the

market for unregulated rail freight transportation;

(c) Plaintiffs and the Class have been required to pay more for Rail Fuel Surcharges than they would have had to pay in a competitive marketplace absent Defendants' price-fixing conspiracy; and

(d) Competition in establishing the prices paid in the United States for unregulated rail freight transportation has been unlawfully restrained, suppressed and eliminated.

113. During the Class Period, Defendants' Rail Fuel Surcharge conspiracy as described herein directly and proximately caused Plaintiffs and the Class to pay supra-competitive prices for Rail Fuel Surcharges that they would not have paid absent such violations. As a result, Plaintiffs and the Class have been injured and damaged in their business and property in an amount to be determined according to proof.

114. The entire supra-competitive overcharge for Rail Fuel Surcharges at issue was passed on to Plaintiffs and the Class.

115. Two antitrust scholars – Professor Robert G. Harris (Professor Emeritus and former Chair of the Business and Public Policy Group at the Haas School of Business at the University of California at Berkeley) and the late Lawrence A. Sullivan (Profes-

sor of Law Emeritus at Southwestern Law School and author of the Handbook of the Law of Antitrust) – have observed that "in a multiple-level chain of distribution, passing on monopoly overcharges is not the exception: it is the rule."

COUNT I

(Injunctive Relief for Violation of § 1 of the Sherman Act)

116. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

117. Defendants entered into and effectuated a contract, combination or conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act.

118. Defendants' contract, combination or conspiracy resulted in an agreement and/or concerted action between and among Defendants and their co-conspirators pursuant to which Defendants fixed, maintained and standardized prices for Rail Fuel Surcharges for rail freight transportation handled through private contracts as well as through other means exempt from regulation.

119. The contract, combination or conspiracy has had the following effects;

- the Rail Fuel Surcharges assessed to Plaintiffs and the Class for unregulated rail freight transportation have been fixed at supra-competitive levels;

- Plaintiffs and the Class have been deprived of the benefits of free competition in the market for unregulated rail freight transportation services; and

- competition in the establishing the prices paid for unregulated rail freight transportation in the United States have been unlawfully restrained, suppressed and eliminated.

120. Plaintiffs and the Class have suffered injury, and will continue to suffer injury in their business or property, proximately caused by Defendants' unlawful conduct, in that they have paid supra-competitive prices for Rail Fuel Surcharges applied to unregulated rail freight transportation services during the Class Period.

121. Plaintiffs and the Class are entitled to an injunction against Defendants, preventing and restraining the violations alleged herein.

COUNT II

(Violation of State Antitrust Laws)

122. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

123. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Arizona Revised Stat. §§ 44-1401 *et seq.*

124. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in

violation of California Bus. & Prof. Code §§ 16700 *et seq.* and California Bus. & Prof. Code §§ 17200 *et seq.*

125. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of District of Columbia Code Ann. §§ 28-4501 *et seq.*

126. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Iowa Code §§ 553.1 *et seq.*

127. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Kansas Stat. Ann. §§ 50-101 *et seq.*

128. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Maine Rev. Stat. Ann. 10, §§ 1 101 *et seq.*

129. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Michigan Comp. Laws Ann. §§ 445.773 *et seq.*

130. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Minnesota Stat. §§ 325D.52 *et seq.*

131. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Mississippi Code Ann. §§ 75-21-1 *et seq.*

132. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Nebraska Rev. Stat. §§ 59-801 *et seq.*

133. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Nevada Rev. Stat. Ann. §§ 598A *et seq*.

134. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of New Mexico Stat. Ann. §§ 57-1-1 *et seq*.

135. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of North Carolina General Statutes §§ 75-1, *et seq*.

136. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of North Dakota Cent. Code §§ 51-08. 1-01 *et seq*.

137. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of South Dakota Codified Laws Ann. Ch. 37-1 (including SDCL § 37-1-33).

138. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Tennessee Code Ann. §§ 47-25-101 *et seq*.

139. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Vermont Statutes, Title 9 §§ 2453, *et seq*.

140 By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of West Virginia §§ 47-18-1 *et seq*.

141. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Wisconsin Stat. §§ 133.01 *et seq*.

142. Class members in each of the states listed above paid supra-competitive, artificially inflated prices for rail freight services. As a direct and proximate result of Defendants' unlawful conduct, members of the Class in each of the identified states have been injured in their business and property in that they paid more for rail freight services than they otherwise would have paid in the absence of Defendants' unlawful conduct.

COUNT III

(Violation of State Consumer Protection and Unfair Competition Laws)

143. Plaintiffs repeat and re-allege the allegations set forth above as though fully set forth herein.

144. Defendants' conduct described herein constitutes unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices in violation of the state consumer protection and unfair competition statutes listed below.

145. Defendants have engaged in unconscionable, unfair or deceptive acts of practices in violation of Arkansas Code § 4-88-101 *et seq*.

146. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of California Bus. & Prof. Code § 17200 *et seq*.

147. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or practices in violation of District of Columbia Code § 28-390 1 *et seq*.

148. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or practices in violation of Florida Stat. § 501.201 *et seq*.

149. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq*.

150. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kansas Stat. § 50-623 *et seq*.

151. Defendants have engaged in unfair competition or unfair or deceptive acts or practices with respect to rail freight services that were indirectly purchased primarily for personal, family, or household purposes in violation of 5 Maine Rev. Stat. § 207 *et seq*.

152. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nebraska Rev. Stat. § 59-1601 *et seq*.

153. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New Hampshire Rev. Stat. § 358-A:1, *et seq*.

154. Defendants have engaged in unfair competition or unconscionable, unfair or deceptive acts or

practices in violation of New Mexico Stat. § 57-12-1 *et seq*.

155. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of New York Gen. Bus. Law § 349 *et seq*; and New York common law against restraints of trade.

156. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of North Carolina Gen. Stat. §§ 75-1.1, *et seq*.

157. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Oregon Rev. Stat. § 646.605 *et seq*.

158. Defendants have engaged in unfair competition or unfair or deceptive acts or practices with respect to rail freight services that were indirectly purchased primarily for personal, family, or household purposes in violation of Rhode Island Gen. Laws § 6-13.1-1 *et seq*.

159 Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vermont § 2451 *et seq*.

160. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of West Virginia Code § 46A-6-101 *et seq*.

161. Class members in each of the states listed above paid supra-competitive, artificially inflated prices for rail freight transportation services. Defen-

dants' mislabeled the Rail Fuel Surcharge and misled Plaintiffs and the Class as the Rail Fuel Surcharge is a revenue enhancement measure instead of a mechanism to recover fuel costs. As a direct and proximate result of Defendants' unlawful, unfair, unconscionable, deceptive and misleading conduct, Plaintiffs and the Class members in the identified states have been injured in their business and property in that they paid more for rail freight services than they otherwise would have paid in the absence of Defendants' flagrant, willful, unlawful, unfair, unconscionable, deceptive and misleading conduct.

COUNT IV

(Unjust Enrichment and Disgorgement of Profits)

162. Plaintiffs incorporate and re-allege, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

163. Defendants have been unjustly enriched through overpayments by Plaintiffs and Class members and the resulting profits enjoyed by Defendants as a direct result of such overpayments in violation of the federal common law as well as common and statutory laws of the following States: Arizona, Arkansas, California, District of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North

Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin. Plaintiffs' detriment and Defendants' enrichment were related to and flowed from the conduct challenged in this Complaint.

164. Under common law principles of unjust enrichment, Defendants should not be permitted to retain the benefits conferred via overpayments by Plaintiffs and Class members.

165. Plaintiffs seek disgorgement of all profits resulting from such overpayments and establishment of a constructive trust from which Plaintiffs and Class members may seek restitution.

WHEREFORE, Plaintiffs pray for relief as follows:

(A) That the Court determine that this action may be maintained as a class action under Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure, that Plaintiffs be appointed as class representatives, and that Plaintiffs' counsel be appointed as counsel for the Class;

(B) That the unlawful contract, combination and conspiracy alleged herein be adjudged and decreed to be:

(1) An unreasonable restraint of trade in violation of Section 1 of the Sherman Act as alleged in Count One herein;

(2) An unlawful combination, trust, agreement, understanding, and/or

concert of action in violation of the state antitrust laws identified in Count Two herein;

(3) Violations of the state consumer protection and unfair competition laws identified in Count Three herein; and

(4) Acts of unjust enrichment as set forth in Count Four herein.

(C) That Plaintiffs and the Class recover compensatory damages, as provided by law, determined to have been sustained by each of them, and that judgment be entered against Defendants on behalf of Plaintiffs and each and every member of the Class;

(D) That Defendants, and each of Defendants' respective officers, directors, agents and employees, and all other persons acting on behalf of or in concert with them, be permanently enjoined and restrained from, directly or indirectly, continuing or maintaining the combination, conspiracy or agreement alleged herein;

(E) That Plaintiffs and members of the Class be awarded restitution, including disgorgement of profits obtained by Defendants as a result of their acts of unfair competition, deceptive practices and unjust enrichment;

(F) That Plaintiffs and the Class recover treble damages, as provided by law;

(G) That Plaintiffs and the Class recover their costs of the suit, including attorneys' fees, as provided by law; and

(H) For such other and further relief as the Court may deem just and proper.

Dated: April 15, 2008

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